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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 178.

CHARLES CLASON, APPELLANT,

vs.

NICK MATKO, DAN SEFFER, JOHN LOPIZICH, J. KRILANOVICH, AND LOUIS VISALIA.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

FILED DECEMBER 24, 1909.

(21,942.)

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 22, 1911.

a In the Supreme Court of the Territory of Arizona.

No. 1069.

CHARLES CLASON, Appellant,
vs.
NICK MATKO, DAN SEFFER, JOHN LOPIZICH, J. KRILANOVICH and LOUIS VISALIA, Appellees.

On Appeal from the District Court of the First Judicial District of the Territory of Arizona in and for the County of Pima.

Edw. J. Flanigan, Esq., attorney for appellant.
John McGowan, Esq., attorney for appellees.

Be it remembered that on to-wit: the eleventh day of September, 1908, came the appellant in the above entitled cause, by his attorney, Edw. J. Flanigan, and filed in the clerk's office of said court, in said entitled cause, a certain Abstract of Record in words and figures following to-wit:

1 In the District Court of the Second Judicial District of the Territory of Arizona, in and for County of Cochise.

NICK MATKO, DAN SEFFER, JOHN LOPIZICH, J. KRILANOVICH and LOUIS VISALIA, Plaintiffs,
vs.
AUGUST DALEY and CHARLES CLASON, Defendants.

ABSTRACT OF RECORD.

Amended Complaint.

As a cause of action against defendants, plaintiffs allege:

I.

Plaintiffs are the absolute owners, as against all persons whatever except the United States of America, and entitled to the exclusive possession of all that parcel of real estate situate in said county, and more particularly described as follows: The Bangor Mining
2 Claim, situate in the Warren Mining District, the location notice of which was recorded on the 27th day of June, 1900, in the office of the county recorder of said county, in Book 15 of records of mines, at pages 116 and 117 of said book, copy of said location notice is hereto annexed, marked Exhibit A, and made a part hereof. Plaintiffs acquired said claim of Scott Turner, the locator thereof, and his grantees thereof, by grant evidence by good

and sufficient deeds of conveyance thereof. Each and all of plaintiffs are citizens of the United States.

II.

That plaintiffs are credibly informed and they believe that defendants make some claim to said premises adverse to plaintiffs.

Therefore, plaintiffs pray for judgment against defendants, establishing plaintiffs' estate in and exclusive possession of said Bangor mining claim, debarring and forever stopping defendants, and each of them, from having or claiming any right or title to said premises adverse to plaintiffs, or either of plaintiffs, and for costs.

JOHN McGOWAN,
Attorney for Plaintiffs.

EXHIBIT A.

Notice of Mining Location.

To all whom it may concern:

Notice is hereby given that the undersigned, having complied with all the reuirements of chapter XXXII, of Title 6, of
3 the Revised Statutes of the United States, and the local mining laws, rules and regulations, have this day located fifteen hundred (1500) linear feet of this vein or lode bearing precious metals, with all dips, spurs, angles and variations, with surface ground three hundred (300) feet on each side of the center of vein; with all mineral deposits contained therein; and all timber growing thereon or appurtenant thereto, under and according to the provisions of the United States Mining Laws, under which it is located.

This claim commences at this monument and notice placed upon the ledge, and runs fifty feet in an easterly direction, and seven hundred and fifty feet in a westerly direction along the ledge. The exterior boundaries are as follows, to-wit: Commencing at a monument of stone at the center of the eastern end of the claim, and running fifty feet in a northerly direction to monument of stone at the northeast corner of the claim; thence in a westerly direction parallel with the ledge eight hundred feet to a monument of stone at the northwest corner of claim; thence at right angles across the ledge in a southerly direction six hundred feet to a monument of stone at the southwest corner of the claim; thence parallel with ledge in an easterly direction eight hundred feet to a monument of stone at the southeast corner of claim; thence at right angles across the ledge in a northerly direction fifty feet to a monument upon the ledge and place of beginning. This ledge may be more generally de-
4 scribed as situated 600 feet south of the Mamie (a patented claim). It is bounded on the north by the Alhassen, On the south by the Contention, On the east by the Webster mining claims; and on the west partly by the Silica quarry, and about 1800

feet in a westerly direction from the town of Bisbee, where it joins the Twilight group of mining claims in the Warren Mining District, Cochise County, Territory of Arizona, and shall be known as the Bangor mining claim.

Dated on the ground, this 10th day of April, 1900.

SCOTT TURNER,
Locator.

Witness:
MARTIN O'HARE.

(Verified.)

Fourth Amended Answer.

(Title of Court and Cause.)

Come now the defendants above named, and answering the amended complaint of the plaintiffs herein made and filed about May 1, 1906, file this — day of June, 1908, their fourth amended answer and deny and allege as follows:

I.

Deny the allegations of paragraph one of said amended complaint, except the recording of a location notice of said claim by one Scott Turner.

II.

Allege that the purported mining claim set out in the com-
5 plaint in the above-entitled action has become forfeited by reason of the following facts, viz: That the annual assessment work required on said claim for the year 1902, nor for the year 1901, were neither of them done and performed, and that on the first day of January, 1903, said claim became open to re-location, and on the first day of May, 1903, before work had been resumed by plaintiffs herein or their grantors, and while said claim was open to re-location as aforesaid, defendant August Daley duly entered upon said land comprised in said claim, and relocated the same for his own use and benefit. That a copy of said location notice is hereto attached, marked "Exhibit A" and a copy of amended location thereof is hereto attached marked "Exhibit B" both of which are made a part hereof.

By way of further defense to said action these defendants further allege:

That this action was originally filed in the above entitled Court on or about August 25, 1903, the defendant August Daley being named therein as sole defendant.

That the first trial of said action was had in said Court on or about August 20, 1904.

That prior to the trial of said action, it was agreed and stipulated by and between the parties thereto by their respective counsel, in substance as follows, to-wit:

"That all parties plaintiff and defendant are now and at all the times mentioned in the pleadings have been each citizens of the United States of America.

6 "That the respective locations, upon which, as shown by the pleadings herein, the parties plaintiff, and defendant, base their rights to the "Bangor" Mining Claim, were each duly made, and that all acts required by the laws of the United States, and the laws of the Territory of Arizona, necessary to vest in the parties so locating good and valid title so far as valid location could vest the same, such as mineral discovery, monumenting of claim, and recording of location notices, etc., were each duly done and performed at the time of said locations, except that plaintiffs do not admit that at the time of said location of defendant Daley the ground was open to such location by reason of failure to do assessment work for the years 1901 and 1902, or to resume work prior to the date of said location."

That pursuant to said agreement said cause went to trial, and submitted to the Court for decision the single issue whether said claim was open to re-location by defendant Daley on May 1, 1903, which was decided against said defendant and judgment entered accordingly.

That thereafter defendant made and filed a motion for a new trial in said cause which was granted and said judgment vacated.

That thereafter and before the above named Court (sitting with a jury) said cause on June 29, 1905, came on again for trial, and said agreement was recognized by counsel and parties to be still in force and effect and the same issue was submitted to the jury as was

7 submitted to the Court on the first trial, being set forth hereinabove and verdict and judgment went for defendant Daley, from which judgment and order denying plaintiffs' motion for new trial they did appeal to the Supreme Court of the Territory of Arizona, which vacated said judgment and remanded the cause for a new trial.

That in the course of the opinion made in said cause (see Matko et al. vs. Daley, 85 Pacific Reporter, page 721) the Court used the following language:

"* * * Under the allegations in the defendant's cross-complaint with respect to the re-location by the defendant of the claim as a "forfeited claim, the location notice of the defendant would seem to be void, in failing to state that the claim was located as abandoned or forfeited property, as required by the statute, and would seem to afford the defendant no ground for the relief claimed Cunningham v. Pirrung, (Ariz.) 80 Pac. 329."

That thereafter and on or about Sept. 24, 1906, the said defendant made and filed his motion to "restore Lost Record" being the agreement and stipulation above mentioned, which was at all times on file in said Court except as in said motion or herein otherwise stated, which said motion has not yet been passed upon by the Court.

That the said defendants Daley and Clason ever since the making and filing of said agreement have under the advice of their counsel, in these proceedings, relied upon said agreement, in doing the an-

nual assessment work on said claims, and the validity of their
8 claim by reason thereof, and have during the years 1904, 1905, 1906 and 1907 done and performed at least one hundred dollars' worth of work on said claim during each of said years, and said agreement has never been rescinded or withdrawn or attempted to be rescinded or withdrawn by plaintiffs at any time since it was made and filed.

For a further and separate defense to said action, these defendants further allege:

That the decision of the Supreme Court of the Territory of Arizona in the said cause of Cunningham v. Pirrung in so far as it holds or construes the provisions of Paragraph 3241 of the Revised Statutes of Arizona (Revision of 1901) as it existed prior to the amendment of 1907, to provide that the re-location of a forfeited mining claim shall be void or voidable, when the re-location notice does not state that the "whole or any part of the ground covered by such re-location is re-located or located as forfeited ground" and said Statute in so far as it justifies such interpretation is contrary to the provisions of Section 2324 of the Revised Statutes of the United States, in its general terms and specifically to that portion thereof which provides that upon a failure to do the assessment work therein required such claim "shall be open to re-location in the same manner as if no location of the same had ever been made" and also contravene the provisions of Sec. 1851 of the Revised Statutes of
9 the United States, and these defendants specially rely upon said provisions of the laws of the United States.

Cross-Complaint.

Further answering and for a cross complaint herein these defendants allege:

I.

That (except in so far as the defendants or either of them have been deprived or divested of title thereto by proceedings inter se) defendants are the owners of and in possession of, those certain lands and premises and that certain mining claim known as the "Bangor Mining Claim" situate and being in the Warren Mining District, in the County of Cochise, and Territory of Arizona, the location notice of which was recorded on the 11th day of July, 1903, in the office of the County Recorder of said Cochise County, in Book 27 Records of Mines, on page 247, a copy of which said location notice is hereto attached, marked "Exhibit A" and hereby made a part of this cross-complaint, as is also attached hereto and made a part hereof a copy of an amended location of said claim, marked "Exhibit B."

II.

That defendants are credibly informed and believe that plaintiffs, with their successors in interest, or their successors in interest, since
10 the pendency of this action, claim an interest in and to all of said Bangor Mining Claim, aforesaid, by reason of a certain location made by one Scott Turner, on the 10th day of

April, A. D. 1900, the location notice of which was filed with the County Recorder in and for Cochise County, on the 27th day of June, 1900, in Book 15 Records of Mines, at page Nos. 116 and 117. That said plaintiffs or their successors aforesaid have no title, estate or interest in or to said Bangor Mining Claim, by reason of the fact that the annual assessment work required by law was not done and performed for the year 1902, nor for the year 1901, and that on the 1st day of January, 1903, said land became open to re-location, and that on the first day of May, 1903, and while said land was open to re-location as aforesaid, and before plaintiffs had resumed work thereon, the defendant Daley entered upon said land and duly located said land as a mining claim, and performed all acts required to perfect said location prior to any attempt of plaintiffs herein to resume work thereon. The said Bangor Mining Claim contains all the mineralized lands which were contained in the purported location alleged in the complaint.

And defendants specially make a part of this cross-complaint all and several the separate defenses heretofore pleaded.

Wherefore defendants pray judgment that plaintiffs take nothing by this action, and for the judgment and decree of this Court establishing the title, estate and interest of the defendants in and to said land, and decreeing that the plaintiffs and all persons claiming by, through or under them be barred and forever estopped from having or claiming any right, title, estate or interest in and to said lands adverse to defendants.

EDW. J. FLANIGAN,
Attorney for Defendants.

(Verified.)

"EXHIBIT A."

Notice of Mining Location.

Lode Claim.

To all whom it may concern:

This mining claim, the name of which is the Bangor Mining Claim, situated on lands belonging to the United States of America, in which there are valuable mineral deposits, was entered upon and located for the purpose of exploration and purchase by A. Daley, a citizen of the United States, the undersigned, on the 1st day of May, 1903.

The length of this claim is 648½ feet and I claim 58 feet in a southeasterly direction, and 420 feet in a westerly direction from the center of the discovery shaft, at which this notice is posted lengthwise of claim.

The general course of the lode deposit and premises is from the easterly to the westerly.

The claim is situated and located in the Warren Mining District,

in Cochise County, in the Territory of Arizona, about 1800
12 feet in a westerly direction from Bisbee, and is bounded on the North by the Al Hassen Claim, and on the South by the Contention Claim.

The surface boundaries of the Claim are marked upon the ground as follows:

Beginning at Monument at a point Easterly direction, 50 feet from the discovery shaft (at which this notice is posted) being in the center of the South Easterly end of said claim, thence 648½ feet to a monument, being the South West end of said claim, thence 584½ feet to a monument, being at the North East corner of said claim; thence 470 feet to a monument, at the place of beginning.

All done under the provisions of Chapter Six, of Title XXXII, of the Revised Statutes of the United States, and an Act of the General Assembly of Arizona, entitled "An Act to Revise and Codify the Laws of the Territory of Arizona" approved March 16th, 1901.

Dated and posted on the ground this 1st day of May, 1903.

A. DALEY.

Witness:

F. A. BOOPER.
CHARLES CLASON.

(Endorsements:) Recorder's office, Tombstone, Cochise Co., Ariz. Filed and recorded at request of Charles Clason, July 11th, A. D. 1903, at 9 A. M. Book 27, Records of Mines, page 247, Frank Hare, County Recorder.

13 "EXHIBIT B."

Amended Notice of Mining Location.

Lode Claim.

To all whom it may concern:

This mining claim the name of which is the "Bangor" Mining Claim situated on lands belonging to the United States of America, in which there are valuable mineral deposits, was originally entered upon and located for the purpose of exploration and purchase by August Daley, a citizen of the United States, on the 1st day of May, 1903.

The length of this claim is 648½ feet, and I claim fifty feet in a southeasterly direction, and 420 feet in a westerly direction from the center of the discovery shaft, at which this notice is posted, lengthwise of the claim.

The general course of the lode deposit and premises is from the Easterly to the Westerly.

The claim is situated and located in the Warren Mining District, in Cochise County, Territory of Arizona, about 1800 feet in a westerly direction from Bisbee and is bounded on the north by the Al Hassan claim, and on the south by the Contention claim.

The surface boundaries of the claim are marked upon the ground as follows:

Beginning at a monument at a point easterly direction 50 feet from the discovery shaft, (at which this notice is posted) being in the center of the southeasterly end of said claim, thence 648½ feet to a monument, being the southwest end of said claim; thence 584½ feet to a monument, being at the northeast corner of said claim: thence 470 feet to a monument at the place of beginning.

Being the same lode located by A. Daley (one of the undersigned) on May 1st, 1903, which notice is recorded in Book 27, Records of Mines, on page 247, Cochise County, Arizona records. Said original location was made as a re-location of forfeited ground, to wit: The Bangor Mining Claim, the location notice of which is recorded in Book 15, Records of Mines, at pages Nos. 116 and 117, in the records aforesaid, by reason of failure to do the assessment work for the years 1901 and 1902.

This further amended notice of location is made without any wa-ver of any previous rights, and to secure all the benefits of par. 3238 of the Revised Statutes of Arizona (1901) without waiving, but especially relying upon the rights conferred upon said Daley and his grantees by said original location, by the laws of the United States with reference to mining locations and re-locations with particular reference to Sec. 2324 of the Revised Statutes of the United States. Chas. Clason is owner of an undivided one half interest under said Daley.

Dated and posted on the ground this 30th day of July, 1906.

AUGUST DALEY.
CHARLES CLASON.

Endorsements: Recorder's office, Tombstone, Cochise Co., Ariz. Filed and recorded at request of E. J. Flanigan, Aug. 16, A. D. 1906, at 9 A. M., Book 25, Records of Mines, pages 512 to 514. Frank Hare, County Recorder. (Filed June 15, 1908.)

Demurrer.

(Title of Court and Cause.)

Come now the Plaintiffs in the above entitled action and demur to paragraph 11, beginning on the first page of Defendants' Fourth Amended Answer herein, and extending down to Defendants' Cross-Complaint on the Fourth page of said answer, on the ground:

I.

That the matters set forth and alleged in said paragraph 11, do not state sufficient facts to constitute any defense, nor any counter claim to the cause of action set forth in the complaint of Plaintiffs herein.

And now comes Plaintiffs and demur to the Cross-complaint, set fourth and pleaded in Defendants' Fourth Amended Answer upon the grounds:

I.

That it does not appear from said Cross-complaint that De-
16 fendants have any right, title or interest in or to the Bangor Mining Claim, the subject matter of this action, or any part thereof.

II.

Said Cross-complaint does not state facts sufficient to constitute any cause of action against Plaintiffs or either of them.

III.

Said Cross-complaint does not state facts sufficient to entitle Defendants or either of them to any affirmative relief or any relief whatever in this action against Plaintiffs or either of them.

Wherefore Plaintiffs pray judgment quieting plaintiffs' title to said mining claim, dismissing said Cross-complaint and for costs of suit.

WM. M. LOVELL AND
JOHN McGOWAN,
Att'ys for Plaintiff.

(Filed June 18, 1908.)

Judgment.

(Title of Court and Cause.)

Be it remembered that the above entitled cause came on for hearing before the court on this 19th day of June, 1908, upon the demurrer of Plaintiffs to the Fourth Amended Answer and Cross-complaint of Defendants to the amended complaint of Plaintiffs herein; John McGowan and William H. Lovell, appearing as
17 counsel for Plaintiffs and E. J. Flanigan and W. B. Cleary appearing as counsel for Defendants, and said demurrer having been argued by the respective counsel and submitted to the Court for its decision, and the court having sustained said demurrer to said Fourth Amended Answer and Cross-complaint of Defendants; and Defendants thereupon in open court declined to amend their said answer and Cross-complaint and electing to stand upon the same, whereupon the attorneys for Plaintiffs moved the court for judgment and decree against Defendants as prayed for in Plaintiffs' said amended complaint herein.

It is now, therefore, ordered, adjudged and decreed that the Plaintiffs in the above entitled action, Nick Matko, Dan Seffer, John Lopizich, J. Krilanovich and Louis Visalia, are and were at the commencement of this action the owners of and entitled to the possession of all that certain mining claim described in plaintiffs' said amended complaint, and situate in Warren Mining District in the

County of Cochise and Territory of Arizona, known as Bangor Mining Claim, described as follows:

Commencing at a monument of stone at the center of the East end of said Mining Claim, and running thence Fifty (50) feet in a Northerly direction to a monument of stone at the Northeast corner of said claim; thence in a Westerly direction parallel with the ledge Eight — (800) feet to a monument of stone at the
18 Northwest corner of said claim; thence at right angles across the ledge in a Southerly direction Six Hundred Feet (600) to a monument of stone at the Southwest corner of said claim; thence parallel with the ledge in an Easterly direction Eight Hundred Feet (800) to a monument of stone at the Southeast corner of said claim; thence at right angles across the ledge in a Northerly direction Fifty Feet (50) to monument on the ledge and place of beginning. The Location Notice of which said Mining Claim was recorded on the 27th day of June, 1900, in the Office of the County Recorder of Cochise County, Arizona Territory, in Book 15, Records of Mines, at Pages 116 and 117; and,

It is further adjudged and decreed that said Defendants have not now, nor had they or either of them at the commencement of this action any right, title or interest in or to said Bangor Mining Claim, or any part thereof; and,

It is further adjudged and decreed that Plaintiffs' title to said above described Mining Claim be, and the same is hereby quieted against said Defendants, and each of them, and Defendants and each of them, their heirs and assigns are hereby debarred from claiming or asserting any right, title or interest in or to said Mining Claim or any part thereof adverse to Plaintiffs; and,

It is further ordered and adjudged that Plaintiffs do have and recover of and from said Defendants their Plaintiffs' costs in this action taxed at $——.

19 Done in open court, this 19th day of June, 1908.

JOHN H. CAMPBELL, *Judge.*

Stipulation.

(Title of Court and Cause.)

It is stipulated by and between the plaintiffs and the defendant as follows, to wit:

That all parties plaintiff and defendant are now and at all the times mentioned in the pleadings have been each citizens of the United States of America.

That the respective locations, upon which, as shown by the pleadings herein, the parties plaintiff, and defendant, base their rights to the "Bangor" Mining claim, were each duly made, and that all acts required by the laws of the United States, and the laws of the Territory of Arizona, necessary to vest in the parties so locating good and valid title so far as valid location could vest the same, such as mineral discovery, sinking of discovery shaft, monumenting of

claim, and recording of location notices, etc., were each duly done and performed at the time of said locations, except that plaintiffs do not admit that at the time of said location of Defendant Daley the ground was open to such location by reason of failure to
20 do assessment work for the years 1901 and 1902, or to resume work prior to the date of said location.

Dated the — day of August, 1904.

JOHN McGOWAN, *Attorney for Plaintiffs.*
FLANNIGAN, FELTUS & FLANIGAN, AND
WM. GILLAND, *Attorneys for Defendant.*

(Filed June 18, 1908.)

Minute Entries.

(Title of Court and Cause.)

Be it remembered that heretofore and upon to-wit: the twenty-first day of December, 1907, the same being one of the regular juridical days of the October, 1907, Term of said Court, the following order inter alia, was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

4257.

NICK MATKO et al., Plaintiffs,
vs.
AUGUST DALEY et al., Defendants.

It is by the Court ordered that the plaintiffs' motion to make the answer filed herein on October 28, 1907, more definite and certain, and the motion of the defendants to supply lost records herein, be set for hear- on Saturday, December 28, 1908, at 9:30 o'clock A. M.

21 And afterwards and upon to-wit the seventh day of March, 1908, the same being one of the regular juridical days of the October 1907 Term of said Court, the following order, inter alia, was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

4257.

NICK MATKO et al., Plaintiffs,
vs.
AUGUST DALEY et al., Defendants.

It is by the Court ordered that this case be and the same is now passed on the calendar.

And afterwards and upon to-wit the sixteenth day of May, 1908, the same being one of the regular juridical days of the April 1908 Term of said Court, the following order, inter alia, was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

4257.

NICK MATKO et al., Plaintiffs,
vs.
AUGUST DALEY et al., Defendants.

It is ordered that this case be set for trial on Monday, June 15, 1908, at 9:30 o'clock A. M.

And afterwards, and upon to-wit: the seventh day of June, 1908, the same being one of the regular juridical days of the April 1908 Term of said Court; the following order, inter alia, was had
22 and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

4257.

NICK MATKO et al., Plaintiffs,
vs.
AUGUST DALEY et al., Defendants.

This case came on this day regularly to be heard upon the motion of the defendants to restore a certain lost stipulation, John McGowan, Esq., and William M. Lovell, Esq., appearing as counsel for the plaintiffs, and Edw. J. Flannigan, Esq., and W. B. Cleary, Esq., for the defendants. Thereupon the defendants, in support of said motion, called as a witness Edw. J. Flannigan, who was duly sworn, examined and cross-examined, and thereupon the defendants rested their case. Whereupon the plaintiffs, to controvert said motion, called as a witness John McGowan, who was duly sworn, examined and cross-examined, and thereupon the plaintiffs rested their case. Argument of the respective counsel was had, and further argument of said motion was ordered continued until Thursday, June 18, 1908, at 9:30 o'clock A. M.

And afterwards, and upon to-wit: the eighteenth day of June, 1908, the same being one of the regular juridical days of the April 1908 Term of said Court, the following order, inter alia, was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

23

4257.

NICK MATKO et al., Plaintiffs,
vs.
AUGUST DALEY et al., Defendants.

The motion of the defendants to restore a certain lost sitpulation having been heretofore argued and the further argument of said motion having been continued until this day, the plaintiffs, to further controvert said motion, recalled as a witness Edw. J. Flannigan, who was further examined and cross-examined, and thereupon the plaintiffs rested their case. Argument of the respective counsel was had, and the matter being fully submitted to the Court, and the Court being fully advised in the premises, does grant said motion.

And afterwards, and upon to-wit: the nineteenth day of June, 1908, the same being one of the regular juridical days of the April 1908 Term of said Court, the following order, inter alia, was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

4257.

NICK MATKO et al., Plaintiffs,
vs.
AUGUST DALEY et al., Defendants.

Come now the plaintiffs herein, and withdraw their motion to strike out portions of the fourth amended answer herein.

24 And afterwards, and upon to-wit: the same day, the following other order was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

4257.

NICK MATKO et al., Plaintiffs,
vs.
AUGUST DALEY et al., Defendants.

This matter came on this day regularly to be heard upon the demurrer of the plaintiffs to the fourth amended answer and the cross-complaint of the defendants herein, John McGowan, Esq., and William M. Lovell, Esq., appearing as counsel for the plaintiffs and Edw. J. Flannigan, Esq., and W. B. Cleary, Esq., for the defendants. Argument of the respective counsel was had and the matter being fully submitted to the Court, and the Court being fully advised in the premises, does sustain said demurrer, and the defendants declining to amend their answer and electing to stand upon the

same, it is ordered that judgment be entered herein in favor of the plaintiffs and against the defendants in accordance with the judgment signed and filed herein, to which ruling of the Court in sustaining said demurrer and in entering judgment in favor of the plaintiffs, the defendants, through their counsel, except and give notice of appeal to the Supreme Court of this Territory.

And afterwards, and upon to-wit: the twenty-seventh day of June, 1908, the same being one of the regular juridical days of the April 1908 Term of said Court, the following order, inter alia, was
25 had and entered of record in said Court in said cause, which said order is in words and figures as follows, to-wit:

4257.

NICK MATKO et al., Plaintiffs,
vs.
AUGUST DALEY et al., Defendants.

It is by the Court ordered that the exceptions of the defendants to the cost bill of the plaintiffs herein, be and the same is now passed on the calendar.

In the District Court of the First Judicial District of the Territory of Arizona in and for the County of Pima.

NICK MATKO, DAN SEFFER, JOHN LOPIZICH, J. KRILANOVICH, and LOUIS VISALIA, Plaintiffs,
vs.
AUGUST DALEY and CHARLES CLASON, Defendants.

Bond on Appeal.

Know all men by these presents: That whereas, the above
26 named Court did in the above entitled action on the 19th day of June, 1908, render judgment in favor of the plaintiffs and against the defendants quieting title to the property in controversy in said action, and upon rendition of said judgment defendants did give notice of appeal therefrom to the Supreme Court of the Territory of Arizona, and the Clerk of said Court has fixed the sum of $250.00 as being at least the probable costs of suit of both the said Supreme Court and the said District Court, and the sum of $500 as being at least double such probable costs.

Now therefore, the defendant Charles Clason as principal and William Robinson and Fred Hedberg as sureties, are each held and firmly bound unto the plaintiffs Nick Matko, Dan Seffer, John Lopezich, J. Krilanovich and Louis Visalia, in the sum of five hundred ($500) dollars in lawful money of the United States, payable to said plaintiffs, if said defendant shall fail to prosecute his said appeal with effect, and conditioned further that defendant shall pay all

costs which have accrued in the said District Court, and which may accrue in the said Supreme Court.

In witness whereof said defendant and sureties named have hereunto set their hands at Bisbee, Arizona, this 14th day of July, 1908.

CHARLES CLASON.
WILLIAM ROBINSON.
FRED HEDBERG.

27 TERRITORY OF ARIZONA,
County of Cochise, ss:

Before me, John W. Hogan, a Notary Public in and for the County and Territory aforesaid, on this day personally appeared William Robinson and Fred Hedberg who being each by me duly sworn, each for himself and not one for the other doth depose and say: That he is one of the sureties above named who executed the above bond on appeal; that he is a resident and freeholder in said County and Territory; that he is worth the sum of $500.00 over and above his just debts and liabilities exclusive of property exempt from execution.

WILLIAM ROBINSON.
FRED HEDBERG.

Subscribed and sworn to before me this 14th day of July, A. D. 1908.

[SEAL.] JOHN W. HOGAN,
Notary Public in and for Cochise County,
Territory of Arizona.

(My commission expires Nov. 17th, 1910.)

Endorsements: No. 4257. In the District Court of the First Judicial District of the Territory of Arizona in and for Pima County, Nick Matko, et als., Plaintiffs, vs. August Daley et al., De-
28 fendants. Bond on Appeal. Approved and filed July 16, 1908. Allan B. Jaynes, Clerk. By Loraine McMillen, Deputy. Edw. J. Flanigan, Bisbee, Arizona, Attorney for Defendants.

TERRITORY OF ARIZONA,
County of Pima, ss:

I, Allan B. Jaynes, Clerk of the District Court of the First Judicial District of the Territory of Arizona, in and for the County of Pima, do hereby certify that the attached record on appeal to the Supreme Court of the Territory of Arizona, in the cause entitled Nick Matko, et al., Plaintiffs, vs. August Daley, et al., Defendants, being Register No. 4257, contains a true copy of all minute entries made in the case and of the bond on appeal, and that the papers thereto attached are all the papers constituting the record in the case.

I further certify that the term of Court at which said cause was tried has not yet expired.

Given under my hand and the seal of said Court attached hereto, at my office in Tucson, Arizona, this 22nd day of August, A. D. 1908.

ALLAN B. JAYNES, *Clerk*.

29 And on to-wit: the twelfth day of January, 1909, being one of the regular juridical days of the January term of said court, 1909, the following order, inter alia, was had and entered of record in said cause, in words and figures following, to-wit:

Title of Cause.

At this day, it is ordered by the Court that this cause be submitted on briefs.

And on to-wit: the twentieth day of March, 1909, there was filed in the clerk's office of said court in said entitled cause a certain Opinion in words and figures following, to-wit:

30 In the Supreme Court of the Territory of Arizona.

No. 1069.

CHARLES CLASON et al., Appellants,
vs.
NICK MATKO et al., Appellees.

Appeal from District Court, Pima County.

Before Mr. Justice Campbell.

Mr. Edward J. Flanigan, attorney for appellants.
Mr. John McGowan, attorney for appellees.

SLOAN, *J.*:

Nick Matko and four others brought suit against August Daley and Charles Clason in the District Court of Cochise County to quiet their title to a mining claim known as the "Bangor," situate in the Warren Mining District. The defendants filed an answer in which they set up a forfeiture of the "Bangor" claim through the failure of the owners to do the annual work thereon for the year 1903, and a relocation of the same ground under the same name by defendants in the year 1904 before any resumption of work by plaintiffs, during that year. To this answer, and made a part thereof, was attached the location certificate of the relocation made by defendants. This notice did not state that any part of the ground included therein was located as abandoned property as required by paragraph
31 3241, Revised Statutes. A demurrer was interposed by the plaintiffs to the answer of defendants which was sustained by

the trial court on the ground that the location certificate made part of the answer, being void under said paragraph, as construed by us in Cunningham vs. Pirring, 9 Ariz. 288, the answer constituted no defense to plaintiffs' suit. The defendants stood upon their answer, whereupon the court, upon a stipulation of facts which had been theretofore entered into and filed by the respective parties, entered judgment for the plaintiffs. The defendants have appealed from this judgment.

The stipulation referred to read as follows:

"That all parties plaintiff and defendant are now and at all the times mentioned in the pleadings have been each citizens of the United States of America.

"That the respective locations, upon which, as shown by the pleadings herein, the parties plaintiff, and defendant, base their rights to the "Bangor" Mining Claim, were each duly made, and that all acts required by the laws of the United States, and the laws of the Territory of Arizona, necessary to vest in the parties so locating good and valid title so far as valid location could vest the same, such as mineral discovery, monumenting of claim, and recording of location notices, etc., were each duly done and performed at the
32 time of said locations, except the plaintiffs do not admit that at the time of said location of defendant Daley the ground was open to such location by reason of failure to do assessment work for the year- 1901 and 1902, or to resume work prior to the date of said location."

It is contended by counsel for the appellants that this stipulation is conclusive upon any question affecting the validity of the location of the "Bangor" mining claim made by them, except the one question of forfeiture of the original location by reason of the failure of the owners thereof to do the annual work for the year 1903; and consequently is a waiver of any defect of pleading which does not have reference to this one question of forfeiture.

It seems to us that counsel for appellants, in urging this view, has overlooked the obvious purpose of the parties in filing the stipulation which was manifestly to have it take the place of testimony or other evidence upon the trial, and not to supplant the pleadings in the case. Undoubtedly the parties might have come into court upon an agreed statement of the case without any formal pleadings under the provisions of paragraph 1390, Revised Statutes, and have obtained such a judgment as the facts might warrant. Such was not the attempt in this case, as appears from the stipulation itself and the conduct of the parties in the proceedings subsequent
33 to the entry of the stipulation. It appears by the record that after the stipulation was entered into and filed both parties amended their pleadings without regard thereto. It, therefore, appears that this was not an agreed case under paragraph 1390 but a stipulation appertaining merely to the matter of evidence upon the trial.

We hold therefore that the trial court did not err in sustaining the demurrer.

Counsel for appellants in his reply brief calls attention to the complaint and argues that it is insufficient to sustain the judgment, under the authority of Keppler vs. Becker, 9 Ariz. 234. The complaint in substance alleged that plaintiffs were the absolute owners, against every one except the government, of the "Bangor" mining claim by deed from one Scott Turner, the locator thereof, and referred to the location notice thereof as a part of the complaint and gave the book and page of its recordation in the office of the County Recorder of Cochise County.

It will be noted that this suit is not what is ordinarily termed an adverse suit. It is an action brought under the provisions of our statute to quiet title. Paragraph 4105, Revised Statutes, among other things, provides that the complaint in an action to quiet title must set forth "the nature and extent of the" plaintiffs' "estate" and must describe the premises. It is apparent from the allegations of the complaint that the "estate" of the plaintiffs in the
34 "Bangor" mining claim was under and by virtue of a location thereof under the Mineral Laws of the United States, and as the notice of location was made part of the complaint it met the requirements of the statute, both as to the title and as to the description of the premises, sufficiently to sustain the judgment, it appearing that no objection was made in the court below to the sufficiency of the complaint by demurrer or otherwise.

In Keppler vs. Becker we held that a complaint in an adverse suit which merely alleged in general terms that the plaintiffs were the owners and entitled to the possession of the mining claim was insufficient and subject to general demurrer.

It is apparent that that was a very different case from this, for it did not even appear in the complaint in that case that the plaintiff claimed title under or by virtue of a mining location and hence there was nothing to indicate the nature and extent of the title or estate.

The judgment is affirmed.

RICHARD E. SLOAN,
Associate Justice.

We concur:

EDWARD KENT, *C. J.*
FLETCHER M. DOAN, *A. J.*
FREDERICK S. NAVE, *A. J.*

35 And on to-wit: the twentieth day of March, 1909, being one of the regular juridical days of the January term of said Court, 1909, the following order and judgment inter alia, was had and entered of record in said cause, in words and figures following, to-wit:

No. 1069.

CHARLES CLASON, Appellant,
vs.
NICK MATKO, DAN SEFFER, JOHN LOPIZICH, J. KRILANOVICH, and LOUIS VISALIA, Appellees.

This cause having been heretofore submitted and by the Court taken under advisement, and the Court having considered the same and being fully advised in the premises:

It is ordered that the judgment of the District Court be and the same is hereby, affirmed.

It is further ordered, adjudged and decreed that the appellees herein do have and recover of and from Charles Clason, appellant herein, and William Robinson and Fred Hedberg, sureties on appeal bond herein, their costs in this court, taxed at nineteen and 60/100 ($19.60) dollars, together with their costs in the court below in this cause incurred, and accrued costs in this court, taxed at four and 95/100 ($4.95) dollars.

36 And on to-wit: the fifth day of April, 1909, came the appellant- by *his* attorney and filed in the clerk's office of said court in said entitled cause *his* certain Petition for Rehearing, in words and figures following, to-wit:—

In the Supreme Court of the Territory af Arizona.

CHARLES CLASON et al., Appellants,
vs.
NICK MATKO et al., Appellees.

Petition for Rehearing.

Comes now the appellant- above named, and respectfully moves the Court for a re-hearing herein upon the following grounds:

1. We respectfully contend that the stipulation should not be narrowed in its operation to a mere substitute or waiver of evidence on the trial of a case, and that the statute, Paragraph 1390, referring to trial on an agreed statement of facts, is not exclusive so as to invalidate other modes of stipulation affecting, not only the evidence, but the pleadings in the case. There could here have been no agreed statement of facts, because an important face was in dispute.

Let us suppose, for the purpose of the argument, a stipulation entered into specifically providing that the defect of the location notice of the defendants was specially waived, and that no
37 advantage should be taken by the plaintiff, either by demurrer, or by objection on the trial to the introduction of the location notice in evidence. In such a case it seems quite clear to us that the plaintiff, so long as such stipulation was unrescinded

and of record, would be bound by it according to its terms. It certainly would be competent for the plaintiff to make such a stipulation, and for the Court to abridge the enforcement of the rights of the defendant under such a stipulation would be tantamount to restricting the parties from in anywise stipulating in reference to such a subject matter and it seems to us that the result of such a holding would be to unduly limit the rights of a party litigant to stipulate on matters for his own advantage or tending to render inexpensive and to shorten litigation.

But if such a stipulation would be upheld, we say that the stipulation in this case, if it mean anything at all, means nothing less than the stipulation supposed above. In the aptest terms it finally settles for all the purposes of that suit the rights of the parties as to the particular matters embraced. It is not in anywise limited by its phraseology to use merely as evidence on the trial. It, in effect, constitutes an estoppel and an agreement of record not as to facts to be given in evidence merely, but of the rights of the parties as antedating the pleadings, the trial and the judgment,
38 which are in themselves only formal modes of determining rights which are in actual controversy.

In this case, the location notice of the defendant was not void nor even avoidable, except conditionally, as accompanying an actual relocation of forfeited ground. On its face it purports to be an original location. Under it might be questioned the validity of the location of the plaintiff. The pleadings of the defendant might be at any time amended to set up such invalidity. Under such a stipulation the plaintiff therefore gained a substantial right in the removal from the field of litigation of any question as to the original validity of his location. It is true, as stated by the court, that the pleadings of the defendant were amended, but the amendments made no departure from the theory of the stipulation that the only question for determination was the question of forfeiture, and if we have a right to consider the fact of amendment as bearing on the construction of the stipulation, we have also the right to consider all matters which occurred during the progress of the litigation, and to take the matters in connection with the terms of the stipulation itself to ascertain the real intention of the parties in making that stipulation. By an inspection of the judgments rendered on the first and second trials, and particularly that on the second trial, it will be seen that the only question left for the jury to de-
39 termine is the question of forfeiture. We respectfully submit that the effect of the decision is therefore to say, that while the defendant continued to be bound by such stipulation, that the plaintiff was not to be bound unless he chose to be so? or saw it to this advantage to be so bound, and that a party may avoid the legitimate consequences of his own voluntary and unrescinded agreement while maintaining the advantages that come to him by reason of such agreement.

The authorities cited in the opening brief are to the effect that parties to the suit may waive by stipulation, or otherwise, the benefit of statutory and even constitutional rights enacted for their benefit.

2. We also wish to say that we specially rely upon the Federal question set forth in the briefs filed by us.

3. Under this head we had intended to quote the following:

"Be it enacted by the Legislative Assembly of the Territory of Arizona:

SECTION 1. That no re-location of an abandoned mining claim made prior to the 12th day of March, 1907, shall be held to be invalid upon the ground that the notice of re-location did not state that said claim was in part or in whole an abandoned mining claim.

SECTION 2. This act shall take effect and be in force from and after its passage."

As to which our first information was that it in terms purported to validate relocations of forfeited mining claims as well as abandoned claims, but the terms do not justify the claim and we content ourselves with quoting the same for the benefit of the Court, and

40 to observe that the Legislature at least thinks it competent and in accordance with the spirit of the original enactment of Sec. 3241 to provide that abandoned mining claims may retrospectively be validated notwithstanding the terminology of the original section, and to re-iterate that the plaintiffs and appellees in this case did do by the stipulation what it was competent for them to do, to-wit: Waived their right to object and admitted the validity of the re-location.

Respectfully submitted.

EDW. J. FLANIGAN,
Attorney for Appellants.

And on to-wit: the twenty-sixth day of April, 1909, came the appellees by their attorney and filed in the clerk's office of said court in said entitled cause their certain Answer to Petition for Rehearing in words and figures following, to-wit:—

41 In the Supreme Court of the Territory of Arizona.

CHARLES CLASON et al., Appellants,

v.

NICK MATKO et al. Appellees.

Answer to "Petition" for Rehearing.

1. The Court's Opinion seems exhaustive on appellants' sub. 1. Counsel miscites Par. 1390, R. S. of 1901, for Par. 1391, id.

Since the whole record has been involved, we urge the point that a stipulation is available to only parties thereto, that defendant Clason is not a party to the stipulation in question, and that he is now the sole party defendant in interest.

20 Ency. Pld. & Pr., 649, note 8 & cases, on the law.

E. J. Flanigan's testimony, Ab. folio 65.

The "stipulation," Clason's cross-examination at the second trial before Justice Doan and a Jury in July, 1905, and the third amended answer, verified by Clason, for the facts.

2. We see no merit in counsel's "federal question," stated on the 12th page of his brief. The last sentence of Par. 3241, R. S. of 1901, was a most reasonable and wise regulation. Mr. Lindleys says it is "unquestionably proper" legislation. I Lindley on Minn., 2d ed., foot of p. 431 and p. 440, note 8. A prospector necessarily knows, and there are strong reasons why the
42 statute should require him to state in his notice, what he thinks the status of the ground he is about to take. He has a free choice to take it as new ground, or as abandoned or forfeited. If he deems it new, he must first find mineral in place; then monument, notice, record, and sink a shaft in which mineral is disclosed at a depth of at least ten feet. If he deems it old, he needs only appropriate to his own use mineral in place and fixtures discovered and constructed there by the industry and privation of another man. Id. Secs. 408, 409. On the other hand, it takes much more and better evidence to prove a relocation than to prove a location. Can counsel reconcile this universal holding with his "same-manner" theory of locating and relocating? Or can he doubt the absolute soundness and justice of this holding? The fact is that the position of locator is intrinsically and radically different from that of relocator. Hence Act 22 of 1907 cannot be literally applied.

In the 3d subdivision of his "Petition," counsel gives a sort of curtain lecture, in which is sandwiched a whole Act of some Arizona Legislature, presumably the 25th. He cites this Act, not as law in the case, but for the benefit of the court, and to observe that the Legislature at least thinks" * * *

We submit that the Act itself disproves the justness of said
43 "observe." The Act is probably the result of legislative inadvertence.

A very little inquiry and thinking would have convinced the late 25th that the last sentence of Par. 3241, R. S. of 1901, had been advisedly adopted by very competent and respectable authorities. That it had been recommended by the Code Commission, solemnly enacted by the 21st Legislature, and recognized as valid by the 22d, 23d and 24th—each equal in authority and dignity to the 25th. We have given Mr. Lindley's opinion of it, supra. Finally, it had been considered and approved by the supreme court, and each of the district courts.

In conclusion, we respectfully submit that the last provision of said Par. 3241, like nearly all our mining statutes, federal, state and territorial, only expresses a requirement that the experience of actual miners and mine operators had convinced them was needed. After reading a standard treatise and its citations on the point, it seems incredible to hear counsel contend that this short simple verbal requirement is constitutionally inhibited. Congress has wisely left to the local legislatures large power and discretion of adding to what it has expressly prescribed on the subject of the location and relocation of mining claims. This is strictly according to the theory and genius of our whole governmental system—the

matters increasing in number but decreasing in importance
44 directly as the territorial extent decreases.
Respectfully submitted.

JOHN McGOWAN,
Attorney for Appellees.

And on the same day to-wit: the twenty-sixth day of April, 1909, there was filed in the clerk's office of said court in said entitled cause a certain Notice of Forfeiture in words and figures following, to-wit:

Notice of Forfeiture.

BISBEE, ARIZ., *Jan.* 15, 1907.

To August Daley, Annie Daley, hi- wife, I. V. Scott, and the heirs, successors and assigns of each of you:

You and each of you are hereby notified that I have expended during the year 1906 and before January 7, 1907, one hundred dollars in labor and improvements upon each of the *of*-lowing described lode mining claims. The "Morning Star No. 2." original location not recorded amended location notice recorded Book 34, Records of Mines, at page 415; the "Anito" location notice recorded Book 27, Records of Mines, at page 250; the "Willinger," location notice recorded Book 27, Records of Mines, at page 249;
the "Maidenhair," location notice recorded Book 27 Records
45 of Mines, at page 251; the "Almetle," location notice recorded Book 27, Records of Mines, at pag- 252; the "Bangor," original location notice recorded in Book 27, Record of Mines, at page 247; all said claim- located in the Warren Mining District, Cochise County, Arizona, and the location notices being recorded in the office of the County Recorder o- said County.

The records of the County Recorder's office of Cochise County, show that you are each entitled to the following interest in said claims: A. Daley, one-half undivided in said Morning Star No. 2, and in said Bangor; Annie Daley his wife, five-twelfths undivided in said Anito, Willinggo, Maidenhair and Almette: I. V. Scott, one-twelfth in said Anito, Wellinga, Maidenhair and Almette.

The work, labor and improvements aforesaid were done and performed by me in order to hold said claims under the provisions of Section 2324 of the Revised Statutes of the United States, and all amendments thereto concerning annual labor upon mining claims, being the amounts required to hold each said lodes for the period ending December 31, 1906.

And if within ninety days after the due publication hereof, (first publication being March 27, 1907), you fail or refuse to contribute your proportion of such expenditures as co-owner in the amount for
each of you shown by the records aforesaid, or in such
46 amount as you may be actually and legally required to pay,
or the said sum of one hundred dollars so expended by me on each of said claims, your interest in the claim or claims for which you or any of you shall be delinquent will become the property

of the subscriber, your co-owner, who has made the required expenditure, by the terms of said section.

CHARLES CLASON.

TERRITORY OF ARIZONA,
County of Cochise, ss:

R. A. Kirk, being first duly sworn, deposes and says: That he is the Business Manager of the Bisbee Evening Miner, a newspaper published in Bisbee, Cochise County, Territory of Arizona, and as such by reason of his acquaintance with the class of facts herein recited, is the person accustomed to make affidavits of publication in said newspaper; that the attached printed copy of "Notice of Forfeiture" signed Charles Clason is from the columns of said newspaper, and said notice was first published in said newspaper in its issue dated the 27th day of March, 1907, and was printed in said newspaper, weekly thereafter, to-wit: on April 3, 10, 17, 24, May 1, 8, 15, 22, 29, June 5, 12, 19, and 26th said June 26th being the last day of the publication thereof.

R. A. KIRK.

47 Subscribed and sworn to before me this 8th day of August, A. D. 1907.

[SEAL.] FRANK PETTEE,
Notary Public.

(My Commission expires Mar. 12, 1910.)

Filed and recorded at request of E. J. Flanigan Aug. 10, 1907 at 9 A. M. in Book 14 Miscellaneous Records, pages 612 and 613.

TERRITORY OF ARIZONA,
County of Cochise, ss:

I, C. A. McDonald, County Recorder in and for said County, do hereby certify that I have compared the annexed and foregoing copy with the original notice of forfeiture, filed for record in my office on the 10th day of June, A. D. 1907; and recorded in Book 14 Miscellaneous Records, pages 612 and 613; and that the same is a full, true and correct copy of said original and of the whole thereof.

Witness my hand and official seal this 11th day of June, A. D. 1908.

[SEAL.] C. A. McDONALD,
County Recorder.

And on to-wit: the thirtieth day of April, 1909, being one of the regular juridical days of the January term of said court, 1909, the following order, inter alia, was had and entered of record in
48 said cause, in words and figures following, to-wit:

Title of Cause.

At this day it is ordered by the Court that the Motion for Rehearing filed herein by appellant, be submitted.

And on to-wit: the first day of May, 1909, being one of the regular juridical days of the January term of said court, 1909, the following order, inter alia, was had and entered of record in said cause, in words and figures following, to wit:

Title of Cause.

At this day it is ordered by the Court that the Motion for Rehearing filed herein by appellant, and heretofore submitted, be and the same is hereby, denied.

And on to-wit: the twenty-first day of June, 1909, came the appellant by his attorney and filed in the clerk's office of said court in said entitled cause his certain Application for, and Allowance of, Appeal in words and figures following, to-wit:

49 In the Supreme Court of the Territory of Arizona.

AUGUST DALEY and CHARLES CLASON, Defendants; CHARLES CLASON, Appellant,

vs.

NICK MATKO, DAN SEFFER, JOHN LOPIZICH, J. KRILANOVICH, and LOUIS VISALIA, Plaintiffs and Respondents.

Notice of Appeal.

Come- now the above named appellant, Charles Clason, and conceiving himself aggrieved by the final judgment entered by the Supreme Court of the Territory of Arizona on the 20th day of March, 1909, in the above entitled cause, in which judgment the final order of the District Court of the First Judicial District of the Territory of Arizona, in and for the County of Pima, was affirmed, and the plaintiffs' and respondents' demurrer to the defendants' and appellant's answer was sustained;

Therefore, the above named appellant does hereby appeal from the said judgment to the Supreme Court of the United States, and pray- that his appeal may be allowed and that a transcript of the record, proceedings, judgment, decision and opinion be duly authenticated and sent to the Supreme Court of the United States.

Dated June —, 1909.

EDW. J. FLANIGAN,
Attorney for the Appellant.

50 And now, to-wit, on this 21 day of June, 1909, the appeal prayed for in the foregoing petition is hereby allowed, and a citation is directed to issue in accordance therewith on the filing of a bond in the penal sum of One Thousand Dollars ($1,000.00), with two good and sufficient sureties, to be approved by the presiding justice of this Court.

EDWARD KENT,
Chief Justice of the Supreme Court of the Territory of Arizona.

And on the same day to-wit: the twenty-first day of June, 1909, came the appellant herein and filed in the clerk's office of said court in said entitled cause his certain Affidavit of Value, in words and figures following, to-wit:

51 In the Supreme Court of the Territory of Arizona.

AUGUST DALEY and CHARLES CLASON, Defendants; CHARLES CLASON, Appellant,

vs.

NICK MATKO, DAN SEFFER, JOHN LOPIZICH, J. KRILANOVICH, and LOUIS VISALIA, Plaintiffs and Respondents.

Affidavit of Value.

TERRITORY OF ARIZONA,
County of Cochise, ss:

Charles Clason, being first duly sworn, on oath says: that he is one of the defendants in the above entitled action; that he is now and was at the time of the commencement of this action acquainted with the value of the property in dispute therein, as described in the complaint and cross complaint therein; that the value of the mines and mining property for the quieting of title to which this action was brought, exceeds the value of five thousand dollars ($5,000.00), and that the amount in controversy in this cause, exclusive of costs, is over five thousand dollars ($5,000.00), and is and was at the time this action was commenced of the value of at least *Six* Thousand Dollars ($5,000.00), or more.

CHARLES CLASON.

52 Subscribed and sworn to before me, this 18th day of June, 1909.

[SEAL.] JOHN W. HOGAN,
Notary Public, Cochise County, Arizona.

My commission expires Nov. 17th, 1910.

And on the same day to-wit: the twenty-first day of June, 1909, there was filed in the clerk's office of said court in said entitled cause a certain Bond in words and figures following, to-wit:

In the Supreme Court of the Territory of Arizona.

AUGUST DALEY and CHARLES CLASON, Defendants; CHARLES CLASON, Appellant,

vs.

NICK MATKO, DAN SEFFER, JOHN LOPIZICH, J. KRILANOVICH, and LOUIS VISALIA, Plaintiffs and Respondents.

Appeal Bond.

Know all men by these presents: That Charles Clason, as principal, and W. G. Hubbard and D. M. Hasler, as sureties, are held and

firmly bound unto Nick Matko, Dan Seffer, John Lopizich,
53 J. Krilanovich and Louis Visalia, the respondents herein, in the penal sum of One Thousand Dollars ($1,000.00), to be paid to said Nick Matko, Dan Seffer, John Lopizich, J. Krilanovich and Louis Visalia, appellees and respondents, their heirs, executors, administrators and assigns, for which payment well and truly to be made we find ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 18th day of June, 1909.

The conditions of the above obligation are such, that if the above named appellant, Charles Clason, shall prosecute his appeal to the Supreme Court of the United States from the judgment of the Supreme Court of the Territory of Arizona, rendered in the above entitled matter, with effect; and if he fails to make his plea good, shall answer and pay all costs, then this obligation to be void; otherwise to be and remain in full force and effect.

CHARLES CLASON.
W. G. HUBBARD.
D. M. HASLER.

TERRITORY OF ARIZONA,
County of Cochise, ss:

W. G. Hubbard and D. M. Hasler being first duly sworn, on their oaths depose and say, each for himself and not one for the
54 other; that he is a resident and free holder within the County of Cochise and Territory of Arizona, and is worth the sum of one thousand dollars ($1,000.00) in property within the Territory of Arizona, over and above his debts, liabilities and property exempt from execution.

W. G. HUBBARD.
D. M. HASLER.

Subscribed and sworn to before me, this 18th day of June, 1909.

[SEAL.] JOHN W. HOGAN,
Notary Public, Cochise County, Arizona.

My commission expires Nov. 17th, 1910.

TERRITORY OF ARIZONA,
County of Cochise, ss:

Before me, John W. Hogan, a Notary Public in and for said County and Territory, on this day personally appeared Charles Clason, W. G. Hubbard and D. M. Hasler, known to me to be the persons whose names are subscribed to the foregoing instrument, and acknowledged to me that they executed the same for the purposes and considerations therein expressed.

Given under my hand and seal of office, this 18th day of June, 1909.

[SEAL.] JOHN W. HOGAN,
Notary Public, Cochise County, Arizona.

My commission expires Nov. 17th, 1910.

Approved:
EDWARD KENT,
Chief Justice.

55 And on the same day to-wit: the twenty-first day of June, 1909, there was filed in the clerk's office of said court in said entitled cause a certain Clerk's Certificate as to sufficiency of Bond in words and figures following, to-wit:

TOMBSTONE, ARIZONA, *June* 19, 1909.

This is to Certify: That after having examined the question of responsibility of W. G. Hubbard and D. M. Hasler, the sureties to the attached bond, in the case of Clason et al., vs. Matko et al. that I consider that they are amply able to respond to the obligation undertaken by them in said bond. I know both Mr. Hubbard and Mr. Clason and they are old residents of Cochise County and have, I believe, virtually all their interests in this county. Mr. Hasler is assessed for property in land worth about $2200.

In testimony whereof I have hereunto set my hand and affixed the seal of this court, this 19th day of June, 1909.

[SEAL.] GEO. B. WILCOX,
Clerk of the District Court.

And on the same day to-wit: the twenty-first day of June, 1909, came the appellant by his attorney and filed in the clerk's office of said court in said entitled cause his certain Assignments of
56 Error in words and figures following, to-wit:

In the Supreme Court of the United States.

AUGUST DALEY and CHARLES CLASON, Defendants; CHARLES CLASON, Appellant,
vs.
NICK MATKO, DAN SEFFER, JOHN LOPIZICH, J. KRILANOVICH, and LOUIS VISALIA, Plaintiffs and Respondents.

Assignments of Error.

Comes now the appellant in the above entitled cause, and makes the following assignments of errors alleged to have been committed by the Supreme Court of the Territory of Arizona, and upon which he, the appellant, will rely in his appeal from the final judgment of the said Supreme Court of the Territory of Arizona, rendered on the 20th day of March, 1909.

Assignment of Error No. 1.

The Court erred in affirming the judgment of the District Court of the First Judicial District of the Territory of Arizona, in and for the County of Pima, wherein the said District Court sustained the demurrer of the plaintiffs and respondents herein to the answer of the defendants and appellant herein.

57 *Assignment of Error No. 2.*

The Court erred in affirming the decree of the District Court aforesaid and rendering judgment for the plaintiffs and respondents upon the stipulation of facts which had been theretofore entered into and filed by the respective parties in said cause for the reason that said stipulation was the only evidence then before the Court upon which it could render judgment, and was a waiver of any defect of pleading and entitled the defendants and appellant herein to a judgment in their favor.

Assignment of Error No. 3.

The Court erred in deciding in accordance with the law announced in Cunningham vs. Pirrung 80 Pac. 329, that it was necessary for the re-location notice of appellant's grantor to set forth that said claim was located as abandoned or forfeited ground in accordance with the requirements of Sec. 3241 Revised Statutes of Arizona, 1901, because.

(*a*) Said Section is not properly to be construed as having any application to a claim re-located as for failure to do annual work.

(*b*) If it be susceptible of such construefion the Section is unconstitutional as contravening Section 1851 of the Revised Statutes of the United States in reference to the powers of the Territo-
58 rial Legislatures and Section 2324 Revised Statutes of the United States in reference to the location of mining claims.

For all of which this appellant prays a reversal of the judgment of the Supreme Court of the Territory of Arizona.

EDW. J. FLANIGAN,
Attorney for the Appellant.

And on to-wit: the seventh day of October, 1909, there was filed in the clerk's office of said court in said entitled cause a certain Supersedeas Bond in words and figures following, to-wit:

In the Supreme Court of the Territory of Arizona.

CHARLES CLASON, Interpleaded with AUGUST DALEY and CHARLES CLASON, Appellant,

vs.

NICK MATKO, DAN SEFFER, JOHN LOPIZICH, J. KRILANOVICH and LOUIS VISALIA, Appellees.

Supersedeas Bond.

Know all men by these presents, That we, Charles Clason, of the City of Bisbee, Cochise County, Arizona, and Gus Hickey of Bisbee, said Cochise County, Arizona, and Fred Coleman of Bisbee, said

Cochise County, Arizona, are held and firmly bound unto the
59 above named Nick Matko, Dan Seffer, John Lopizich, J. Krilanovich and Louis Visalia in the sum of Five Hundred Dollars, to be paid to the said Nick Matko, Dan Seffer, John Lopizich, J. Krilanovich and Louis Visalia, for the payment of which well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors and administrators, jointly and severally firmly by these presents.

Sealed with our seals, and dated the 24th day of Sept. 1909.

Whereas, the above named Charles Clason has prosecuted an appeal to the Supreme Court of the United States, to reverse the decree rendered in the above entitled suit by the Supreme Court of the Territory of Arizona on the 20th day of March, 1909.

Now, therefore, the condition of this obligation is such, that if the above named Charles Clason shall prosecute said appeal to effect and answer all damages and costs, if he fail to make said appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

CHARLES CLASON.
GUS HICKEY.
FRED COLMAN.

TERRITORY OF ARIZONA,
County of Cochise, ss:

Gus Hickey and Fred Colman, whose names are subscribed
60 as sureties to the within bond, being severally duly sworn, each for himself, deposes and says: That he is a resident and free holder within the Territory of Arizona; that he is worth the sum of Five Hundred Dollars, over and above all his just debts and liabilities, and over and above all property exempt from execution and forced sale.

GUS HICKEY,
FRED COLMAN.

Subscribed and sworn to before me this 24th day of Sept., 1909.

[SEAL.] JOHN W. HOGAN,
Notary Public in and for the County of Cochise, Territory of Arizona.

My commission expires November 17, 1910.

Approved as to form, amount and sufficiency of sureties.
Dated Phoenix, Oct. 7th, 1909.

EDWARD KENT,
Chief Justice.

61 UNITED STATES OF AMERICA,
Territory of Arizona, ss:

I, F. A. Tritle, Jr., Clerk of the Supreme Court of the Territory of Arizona, do hereby certify the above and foregoing to be a full, true and complete copy and Transcript of the Record, including the

Abstract of Record, Opinion, Judgment, Petition for Rehearing, Answer to Petition for Rehearing, Notice of Forfeiture, Application for Appeal and Allowance, Affidavit of Value, Appeal Bond, Clerk's Certificate as to sufficiency of bond, Assignments of Error, Supersedeas Bond, and all minute entries had and entered of record in a certain cause lately pending in said Court, No. 1069, wherein Charles Clason was appellant, and Nick Matko, Dan Seffer, John Lopizich, J. Krilanovich, and Louis Visalia were appellees, as the same remain on file and of record in my office.

And I further certify that the same constitute the record in said cause.

And I further certify that the attached Citation is the original issued by said Supreme Court.

In Witness Whereof, I have hereunto set my hand and the seal of said Court, this 16 day of November, A. D., 1909, at Phoenix, Arizona.

[Seal Supreme Court of Arizona.]

F. A. TRITLE, JR.
Clerk Supreme Court.

62 In the Supreme Court of the United States of America.

CHARLES CLASON, Impleaded with AUGUST DALEY and CHARLES CLASON, Appellant,
vs.
NICK MATKO, DAN SEFFER, JOHN LOPIZICH, J. KRILANOVICH, and LOUIS VISALIA, Appellees.

Affidavit of Service.

TERRITORY OF ARIZONA,
County of Graham, ss:

Chas. P. Pearson being duly sworn deposes and says: That he is a male citizen of the United States, over the age of twenty-one years, and not interested in the above entitled action. That on the 2d day of October, A. D., one thousand nine hundred and nine he did personally serve upon John McGowan, the attorney of record for the appellees above named, at Safford, in the County of Graham, Territory of Arizona, a true copy of the attached "Alias Citation" by then and there personally delivering into the hands of said McGowan, personally, said true copy of said Alias Citation, and did then and there exhibit to him said original "Alias Citation." Further deponent saith not.

CHAS. P. PEARSON.

Subscribed and sworn to before me this 7th day of October, A. D. 1909.

[Seal A. R. Lynch, Notary Public, Graham Co., Arizona.]

A. R. LYNCH,
Notary Public in and for the County and Territory Aforesaid.

My commission expires Aug. 29, 1912.

63 In the Supreme Court of the United States of America.

CHARLES CLASON, Impleaded with AUGUST DALEY and CHARLES CLASON, Appellant,

vs.

NICK MATKO, DAN SEFFER, JOHN LOPIZICH, J. KRILANOVICH and LOUIS VISALIA, Appellees.

Alias Citation.

THE UNITED STATES OF AMERICA, *ss*:

To Nick Matko, Dan Seffer, John Lopizich, J. Krilanovich and Louis Visalia, and to John McGowan, their attorney:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, in the District of Columbia, within sixty days from the date hereof pursuant to an appeal filed in the Clerk's office of the Supreme Court of Arizona, wherein said Charles Clason is appellant and the said Nick Matko, Dan Seffer, John Lopizich, J. Krilanovich and Louis Visalia are respondents, to show cause, if any there be, why the judgment in said appeal mentioned, to-wit: The judgment of the Supreme Court of the Territory of Arizona, dated and rendered March 20, 1909, in a certain cause wherein the said August Daley and Charles Clason were defendants and Charles Clason was appellant, and the said Nick Matko, Dan Seffer, John Lopizich, J. Krilanovich and Louis Visalia were respondents, should not be corrected and speedy justice done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 22 day of September, 1909.

EDWARD KENT,
Chief Justice of the Supreme Court of the Territory of Arizona.

64 [Endorsed:] Supreme Court of the United. Charles Clason, Appellant, vs. Nick Matko et al., Appellees. Alias Citation. No. 1069. In the Supreme Court of Arizona, Charles Clason vs. Nick Matko et al. Alias Citation. Filed Octo. 14, 1909. F. A. Tritle, Jr., clerk.

Endorsed on cover: File No. 21942. Arizona Territory, Supreme Court. Term No. 178. Charles Clason, appellant, vs. Nick Matko, Dan Seffer, John Lopizich, J. Krilanovich and Louis Visalia. Filed December 24th, 1909. File No. 21942.

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Brief of Appellant

SUPREME COURT OF THE
UNITED STATES

October Term 1911

No. 178

CHARLES CLASON, APPELLANT,

vs.

NICK MATKO, DAN SEFFER, JOHN
LOPIZICH, J. KRILANOVICH
and LOUIS VISALIA

APPEAL FROM THE SUPREME COURT OF THE
TERRITORY OF ARIZONA

SUPREME COURT OF THE UNITED STATES

. October Term 1911

No. 178

CHARLES CLASON, APPELLANT,

vs.

NICK MATKO, DAN SEFFER, JOHN LOPIZICH, J. KRILANOVICH and LOUIS VISALIA

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA

Brief of Appellant

STATEMENT OF THE CASE.

The action was brought by Nick Matko and others, the appellees herein, against Charles Clason and August Daley, the former of whom is the appellant herein, in the District Court of the Second Judicial District of the Terrtory of Arizona, in and for Cochise County, to quiet the title to the Bangor Mining Claim (lode) under the provision of Sec. 4104 *et seq.* of the Territorial Statutes, Civil Code, Revised Statutes of 1901.

The answer of the defendants relies upon a "forfeiture" for failure by plaintiffs to do the annual work as provided by law for the years 1901 and 1902 and affirmative relief is also demanded by cross complaint.

(See pages 1 to 8 Printed Transcript of Record.)

To the answer and cross-complaint the plaintiff demurred gennerally. (Pages 8 to 9, folios 15 and 16.)

The District Court, First District, Pima County (to which

Court plaintiffs had theretofore moved the cause on change of venue) sustained the demurrer and judgment was entered accordingly in favor of the plaintiffs.

(Pages 9, folio 17, page 13 folio 24.)

From this judgment the defendant Charles Clason appealed to the Supreme Court of the Territory. Proper proceedings to effect a severance were had and taken by Clason before perfecting the appeal, which are in the record, and no question was made in the Supreme Court of the Territory that severance had been effected and will probably not be made in this Court.

The Supreme Court of the Territory by an opinion filed March 20, 1909, affirmed the judgment of the District Court of the First Judicial District, for Pima County, rendered as aforesaid.

(See Opinion p. 16 fol. 30 Id.)

A petition for rehearing was filed April 5,1909 by appellant herein (See p. 19 fol. 37 Tr.) and on May 1st, 1909, by the Supreme Court denied.

Application for appeal was filed, June 20, 1909, in said Court, and on 21st of June 1909 allowed.

(P. 25 fol. 50 Id.)

The decision of the case in the District Court was controlled by the opinion of the Court in the case of Cunningham vs. Pirrung, 80 Pac. 329, in which the Supreme Court had held that the relocator of ground forfeited for failure to do the annual work as required by Sec. 2324 of the Revised Statutes of the United States, must, in his location notice state, if he relies upon such forfeiture by the original locator, that the claim is located as abandoned property in compliance with the requirements of Sec. 3241 of the Revised Statutes of Arizona 1901, which prior to its amendment of 1907 and as in force at the time of the making of the relocation herein was in the following language:

"3241. (Sec. 11) Such affidavit, when so recorded, "shall be *prima facie* evidence of the performance of such "labor or the making of such improvements, and said orig- "nal affidavit, after it has been recorded, or a certified copy "of record of same, or the record of same shall be received "as evidence accordingly by the courts of this territory. "The relocation of forfeited or abandoned lode claims shall "only be made by sinking a new discovery shaft and fixing "the boundary in the same manner and to the same extent "as is required in making an original location; or the re- "locator may sink the original discovery shaft ten feet

"deeper than it was at the date of the commencement of "such location, and shall erect new or make the old monu- "ments the same as originally required. In either case a "new location monument shall be erected, and the location "notice shall state if the whole or any part of the new lo- "cation is located as abandoned property, else it shall be "void."

Inasmuch as the location notice of August Daley to whose rights this appellant succeeded, did not comply with the requirement of statement as to abandonment (See page 6 fol. 11 "Exhibit A" Id.) the District and Supreme Courts both adjudged that the answer and cross-complaint were insufficient in law.

The Federal question was preserved by special reliance upon the same in the answer (See page 5 fol. 8 Id.) in the briefs filed in the Supreme Court, and in the Petition for rehearing, and now constitutes one of the grounds which we shall present to this Court for a reversal of the judgment.

If the stipulation of facts, referred to in the answer (P. 4, fol. 6 Id.) and (P. 10 fol. 19 Id.) had been given the effect we claimed for it, as admitting the validity of our location, the ruling of the Court would presumably have been for us, on the demurrer, and judgment would have followed, quieting our title, plaintiffs not having answered over. But the District Court did not think the stipulation was broad enough in its terms to meet with the interpretation claimed for it by appellant, and what the Supreme Court thought of it is shown by the opinion.

The following are all the opinions of the Supreme Court upon the construction of Sec. 3241 of the Arizona Civil Code.

Cunningham vs. Pirrung, 80 Pac. 329, 9 Ariz. 288.
Score vs. Griffin, 80 Pac. 331, 9 Ariz. 295.
Kinney vs. Lundy, 89 Pac. 496.
Matko vs. Daley, 85 Pac. 721.
Clason vs. Matko, 100 Pac. 773.

(Opinion in Record.)

ASSIGNMENTS OF ERROR.

Assignment of Error No. 1.

The Court erred in affirming the judgment of the District Court of the First Judicial District of the Territory of Arizona, in and for the County of Pima, wherein the said District Court sustained the demurrer of the plaintiffs and respondents herein to the answer of the defendants and appellant herein.

Assignment of Error No. 2.

The Court erred in affirming the decree of the District Court aforesaid and rendering judgment for the plaintiffs and respondents upon the stipulation of facts which had been theretofore entered into and filed by the respective parties in said cause for the reason that said stipulation was the only evidence then before the Court upon which it could render judgment, and was a waiver of any defect of pleading and entitled the defendants and appellant herein to a judgment in their favor.

Assignment of Error No. 3.

The Court erred in deciding in accordance with the law announced in Cunningham vs. Pirrung 80 Pac. 329, that it was necessary for the relocation notice of appellant's grantor to set forth that said claim was located as abandoned or forfeited ground in accordance with the requirements of Sec. 3241 Revised Statutes of Arizona, 1901, because,

(a) Said Section is not properly to be construed as having any application to a claim relocated as for failure to do annual work.

(b) If it be susceptible of such construction the Section is unconstitutional as contravening Section 1851 of the Revised Statutes of the United States in reference to the powers of the Territorial Legislatures and Section 2324 Revised Statutes of the United States in reference to the location of mining claims.

BRIEF OF THE ARGUMENT.

The Federal question was as stated above preserved and specially relied upon and argued at length in the District and in the Supreme Courts.

That we are properly in this Court follows we think from the provisions of the Revised Statutes of the United States as shown by the syllabus of Territory of New Mexico vs. Denver & Rio Grande R. R. Co., 203 U. S. 38; 51 L Ed. 85 which is as follows:

"A controversy as to the constitutional right of a "territorial legislature to pass a specified law under the "broad legislative power conferred by U. S. R. S. 1851 in- "volves the validity of an authority exercised under the "United States, within the meaning of the act of Mar. 3, "1855 (23 St. at L 443, Chap. 355, U. S. Comp. Stat. "1901, p 572 Sec. 2) defining the appellate jurisdiction of "the Supreme Court of the United States over the Supreme "Courts of the Territories."

The amount in controversy is also over the sum required by Section 1 of that Act, to-wit: over $5,000.

(See page 26 fol. 51 Tr. of Rec.)

As being the better logical order of presentation we first present the argument on Assignment of Error No. 2. and then on Assignment of Error No. 3, concluding with Assignment of Error No. 1.

ASSIGNMENT OF ERROR NO. 2.

The stipulation should be fairly construed so as to effectuate the intentions of the parties thereto.

Enc'y of Pl. and Pr. Book 20, p. 657.

A reading of the stipulation we believe will manifest that it was the intention of the parties formally and expressly to admit all questions pertaining to the validity of the respective locations except the single question which was: Was the ground open to relocation on May 1st, 1903, for plaintiffs default in performing the work required by law? All acts required by the laws of the Territory of Arizona are admitted to have been performed in making the relocation which would include compliance with Sec. 3241, in any construction thereof. The enumeration of mineral discovery, and the other acts required by law cannot be said by the wording of the stipulation to have been intended as exhaustive, but merely illustrative of what the parties considered necessary to make a valid location or relocation; there is, in the language of the stipulation that "all acts required" by law "necessary to vest in the parties so locating good and valid title" * * * * * "were each duly done and performed," and in the only exception saved from the general admission and in the construction placed upon it by the parties themselves, the most cogent proof of what was actually intended.

In accordance with the stipulation (submitting the one issue) the two first trials were had; plaintiffs actually recovered judgment under it and took the benefits of admissions therein; on the second trial they reversed a judgment in favor of defendants on that single issue: yet in the face of the stipulation unchallenged of record, and from a standing in court acquired by virtue of proceedings under the stipulation, and in the face of the fact that defendants have expended money in doing the assessment work on the waiver of the defect in the location notice, they seek now in effect to disregard its binding force, and by demurrer virtually to rescind the stipulation in toto, no application to the Court having been made for the purpose, and while

admitting by the demurrers the truth of the allegations as to the stipulation.

The location notice was defective under the rule laid down in Cunningham vs. Pirrung, (80 Pac. 329). It is not necessary that the Court should in this case go so far as some of the decisions which hold that even a void act may be validated so far as the parties are concerned by stipulation, because the Territorial Court in Kinney vs. Lundy, 89 Pac. 496, has held that a location notice, defective in the particular that ours is in this case, is not void but merely voidable; it is therefore capable of being validated, and that being so, we hardly know of any mode in which this could be done more efficaciously than by an agreement with the party entitled to raise the question.

That such a waiver can be made we cite the following:

"Parties by their stipulations may in many ways make the law for any legal proceedings to which they are parties, which not only binds them but which the courts are bound to enforce. They may stipulate away statutory, and even constitutional rights. They may stipulate for shorter limitations of time for bringing actions for the breach of contracts than are prescribed by the statutes, such limitations being frequently found in insurance policies. They may stipulate that a decision of a court shall be final, and thus waive the right of appeal, and all such stipulations not unreasonable, not against good morals, or some public policy, have been and will be enforced; and generally all stipulations made by parties for the government of their conduct or the control of their rights, in the trial of a cause, or the conduct of a litigation are enforced in the courts." (Citing many New York cases.)

Matter of Pet N. Y. L. & W. R. Co. 98 N. Y. at page 453.

And this language is quoted with approval in Brady vs. Nally (N. Y.) 45 N. E. (bottom first column, page 549) holding that a party may waive the benefit of a rule of evidence in regard to writings and the waiver will be upheld.

A stipulation admitting the validity of an invalid city ordinance is upheld in Van Horn vs. Burlington (Iowa) 28 N. W. 547.

An agreement between attorneys to submit cause on petition and answer binds the clients and will be enforced, and it will not be interfered with because a party has improvidently waived certain defenses. (Citing cases.)

McCann vs. McLennan 3 Neb. 28.

Stipulation as to law governing case will be given effect.

In Re. Cullinan 99, N. Y. S. 374.

That "a party may by stipulation of himself or his attorney waive the benefit of a constitutional or statutory provision enacted for his protection, where it is exclusively a matter of private right and no considerations of public policy or morals are involved" is said to be law and cases cited in support of the statement in 20 Enc'y of Pl. and Pr. 607.

And as to what have been said to be against public policy we refer the court for examples to instances referred to on page 609 same work none of which are analagous to the case here.

And it is held in Bennett vs. Bennet, (Neb.) 96 N. W. 994 (on re-hearing) that if a defendant at a trial stipulate that a fact exist he may not secure a reversal after judgment against him because of a defective pleading of the stipulated fact. On page 995 (1st. col.) the court says that plaintiff would have been entitled to amend his complaint if necessary to allege the fact as stipulated.

In the case of Hine vs. Railroad Co., 149 N. Y. 154, 43 N. E. 414, the court as a condition to an appeal by defendant, required defendant to enter into a stipulation in effect precluding defendant from ever raising any question as to the plaintiff's right to maintain the action. On page 416 the following language is used:

"(The Stipulation was an agreement to waive every objection that could possibly be made founded upon the contract or deed and the courts below have only held the defendants to their agreement. * * * It may be true as an abstract proposition, that at the time of the trial, the plaintiff was not the owner of the premises though there is no finding or legal proof of the fact. But it was of no practical consequence since the defendants by a binding stipulation had precluded themselves from ever raising the question or pleading or proving the fact. * * * It contravened no rule of morals or public policy and is as binding on this court as the courts below."

In Water Supply and Storage Co., vs. Larimer, (Colo.) 53 Pac. 386 the court upheld a stipulation as to priorities as conclusive and evidence on the point contradictory of the stipulation was held not to affect the fact stipulated.

The law in Pennsylvania is stated to be that counsel may make any stipulation which does not affect the jurisdiction or the due order of business and convenience of the court, and it will be enforced, as the law of the case.

Muir vs. Preferred Acc. Ins. Co. 53 A, 158, the court holding that party may waive a provision made for his benefit by law.

Agreement of an attorney for a railroad company to admit hereasay evidence, though not in writing, and before suit actually pending made at time of proceeding to perpetuate testimony and deposition not taken in consequence, will be enforced.

Thompson vs. Fort Worth, 73 S. W. 29 (Tex.)

That the conclusive effect of a tax deed may be waived is held in Tracey vs. Reed, 2 L. R. A. 773, without discussion.

And that what is admitted to be law by either party at the trial of a cause is binding upon him if accepted by the other party is held in Sittig vs. Birkenstack, 35 Md. 273, in which it is said that the admission becomes the law of the particular case and it is error in the court to reject a prayer the correctness of which is conceded.

The only case from our own jurisdiction which decides any question pertaining to the effect of a stipulation is Graves vs. Alsap, 1 Arizona, (25 Pac. 836). In the course of the opinion language is used which would seem, considered apart from the context and the facts to be against our position. But the court decided that a stipulation as to the passage of a statute by the Legislature could not be made, in a contest between the parties for the office of Probate Judge, because such stipulation was not confined to its effect upon the private rights of the parties, but afected a matter of moment to the public at large.

But the reason of the decision establishes, we believe, by a legitimate inference, the proposition that where on the other hand only the rights of the individual parties are concerned, the stipulation would be enforced in accordance with decisions already cited.

We also cite:

Peo. vs. Stephens, 52 N. Y. 306.

Vail vs. Stone, 13 Ia. 285.

Unless the stipulation is expressly so limited by its own terms it will bind upon all trials of the case, and the only remedy of the party claiming to be injuriously affected is to move to relieve him from its operation upon a proper showing made by him.

Enc'y of Pl. and Pr. Vol. 20, page 626 and cases cited.

Clason vs. Baldwn, 46 N. E. at page 324.

Brown vs. Pechman, 33 N. E. 732 (S. C.).

Lee vs. Wharton, 11 Tex. 61.

Prestwood vs. Watson, 20 So. 600 (Ala.).

Ex Parte Hayes, 9 So. 156 (Ala.) .

Hinckley vs. Beckwith, 23 Wis. 328.

United States Express Co. vs. Jenkins, 73 Wis. 474.

And the rule is applied as to use of depositions in Vater vs. Hinde, 32 U. S. 282, 8 L. Ed. 675.

Blankinship vs. Oklahoma City Light and Water Power Co. (Okl.) 43 Pac. 1088 holds that it is erroneous to try a case and receive evidence as to the facts stipulated in disregard of the stipulation; and that so long as a stipulation remains unchallenged of record it is a solemn judicial admission and conclusive on the parties.

See also the case of Consolidated Steel & Wire Co. vs. Burnham, et al., (Okl.) 58 Pac. 654.

ASSIGNMENT OF ERROR NO. 3.

(a) **Section 3241 Rev. Statutes of Arizona 1901, (quoted above) is not properly to be contrued as having any application to a mining claim relocated as for failure to do annual work.**

Our contention briefly stated, on this point, is that Section 3241 should be interpreted as if it read: "In either case, "a new location monument shall be erected, and if the "whole or any part of the new location is located as aban- "doned property, the location notice shall (so) state." and that the words "abandoned property" mean abandoned property and not abandoned and forfeited property. In contending for such interpretation we do not, of course, concede that such meaning any more than the one placed upon it by the Court, would not be repugnant to Federal enactment; but as we look at it, it is not necessary that this Court should so hold, as our rights are based upon the relocation of a claim forfeited for failure to do annual assessment work.

Besides this meaning two others are possible, both of which we say are inconsistent however with the evident intent of the section. First; the meaning placed upon it by the Court in the Cunningham and Score cases, and secondly, that it was intended thereby to require that the notice of relocation should state affirmatively or negatively on the subject of abandonment. In such case, the location notice in case of a forfeiture should say "that the claim is not located in whole or in part as abandoned property." To a prospector this might or might not convey the information that it was in fact located as forfeited ground, accordingly as such construction was known, and he was acquainted with it. It would at least have the merit of accuracy by indirection.

The Courts construction can perhaps best be shown in short compass by two short quotations from the opinions.

"The locator must determine therefore, whether such "abandonment and forfeiture has in fact taken place, and if "he so decides, must make his location accordingly, and un- "der our statute, must state in his location certificate that he "locates the same as *abandoned ground*.. And in such case, "in a suit to establish his title, the burden is on him to "prove that the ground was *forfeited or abandoned*, and "that is the issue to be determined."

Cunningham vs. Pirrung, 80 Pac. 1st col. 331.

"We have heretofore held that it is incumbent upon "a person making location of an *abandoned or forfeited* "claim to state in his notice that the same is located in "whole or in part as *abandoned property*." (Italics ours.)

Kinney vs. Lundy 89 Pac. last col. p. 497.

In the first place, the well recognized distinction between abandoned and forfeited claims is by this construction obliterated.

That such distinction exists, see

Farrel vs. Lockhart, 210 U. S. 142, 52 L. Ed. 994.

Black vs. Elkhorn Mining Co. 163 U. S. 445; 41 L. Ed 221.

McCarthy vs. Speed, 77 N. W. 591.

Street vs. Delta Mining Company 112 Pac. 705.

St. John vs. Kidd, 26 Cal. 271.

27 Cyc. 596 *et seq.*

Cunningham vs. Pirrung, 80 Pac. 329.

Sec. 643 Lindley on Mines (2nd Ed.).

And Section 3241 R. S. of Ariz. 1901 itself.

If it is proper to construe the word "if" as having reference to the *"whole or any,"* (and we believe there is no room for other construction on the point) then the contingency of there being no such ground, is clearly contemplated; and the conclusion of the Court that "abandoned ground" connotes forfeited and abandoned ground permits the legitimate conclusion to be drawn that there may be a *relocation* of ground neither forfeited or abandoned. This absurdity is removed when we construe the words "abandoned property" as not including "forfeited" ground.

It is obvious therefore that this interpretation was not involved in the premises from which the Court arrived at its rulings. In that event, the word "if" imports no condition or contingency as applied to anything in the statute, excluding

under that theory, the only alternatives to which it grammatically applies.

We think to throw light on the matter, the Colorado Statute, (See p. 1830 Lindley 2d. Ed.) may well be read.

Even assuming for the purpose of the argument that abandoned ground as therein used, refers to forfeited ground as well, the statute contemplates a positive taking. The location notice may state *that* it is so taken, in whole or in part.

The words "in either case" in the Arizona statute do not help the Court's construction. These words are found in the Colorado section as applicable to the alternatives immediately preceding as to the discovery shaft, and have the same meaning in the Arizona law.

Furthermore as contradistinguished from the Colorado section the distinction in Sec. 3241 between forfeited and abandoned claims is plainly implied by use of the additional term "forfeited" emphasizing the particular application of the requirement as to the location notice to abandoned claims as set forth in the last sentence.

An argument against these views may be thought to arise from the phrasing of the general rule that a relocation in any event admits the validity of the original location.

Lindley on Mines, Sec. 404.
Golden vs. Murphy, 103 Pac. 398.
Zerres vs. Vanina, 150 Fed. 564.
Belk vs. Meagher, 104 U. S. 279.
Willis vs. Blain, 20 Pac. 798.
Providence G. M. Co. vs. Burke, 57 Pac. 641 (Ariz.)
Slothower vs. Hunter, 88 Pac. 38.

In all these cases there was an express statement in the location notice that there was in fact a relocation. We have been unable to find any authority to the effect that such a status existing at the time of location is fixed by other means than such an express admission. The effect of these decisions therefore is to hold the locator to the position he voluntarily assumes. We think we are warranted in saying that the law in the absence at least of any statute on the subject leaves the locator free on the point.

In Carlin vs. Freeman 75 Pac. 26 (Colo.) the Court in response to the contention of counsel that the word "may" should be understood as "must" in the Colorado statute as to locating abandoned claims used the following language:

"To rule that 'may' in the statute, is mandatory, and "that the certificate of relocation of abandoned territory

"is void unless it contains a statement that the ground in-
"cluded therein in part or in whole, is abandoned, would
"impose upon the locator of such ground the peril of ascer-
"taining that the ground had never been previously located
"which in many cases would be impracticable, and would
"impose an unreasonable requirement, if indeed, it would
"not to be in direct conflict with Rev. St. U. S. 2324
"which provides that a claim upon which the assessment
"work has not been performed 'shall be open to relocation
"in the same manner as if no location of the same had ever
"been made.' "

If the subsequent claimant must decide the status of the former claim at his peril, then years might elapse from the time the former claimant did any work whatever, but if location had been perfected in the first instance, he would be required to do this, or suffer defeat if the first locator determined to contest the new location after the subsequent claimant had perhaps shown its great value by development.

In the language of Justice Brewer, in Del Monte M. & M. Co. vs. Last Chance M. & M. Co. 171 U. S. 77, 43 L. Ed. at page 81;

"Although a locator finds distinctly marked on the sur-
face a location it does not necessarily follow therefrom
"that the location is still valid and subsisting: on the con-
"trary, the ground may be entirely free for him to make a
"location upon. The statute does not provide and it can-
"not be contemplated that he is to wait until by judicial
"proceedings it has become established that the prior lo-
"cation is invalid or has failed before he may make a lo-
"cation. He ought to be at liberty to make his own location
"at once, and thereafter in the manner provided by the
"statutes litigate if necessary."

See also Russel vs. Brousseau, 65 Cal. 608.
Du Prat vs. James, 65 Cal. 555; 42 Pac. 562.

But the Court in Cunningham vs. Pirrung held that bare evidence on the ground of a former location, without more under this statute, cast the burden on the subsequent claimant to successfully maintain in a legal proceeding against evidence produced to defeat *any* position he might then, upon almost necessarily insufficient information, assume; and holds him bound by such election, as if voluntarily made, whatever the fact may be.

In the language of the dissenting opinion in National M.

& M. Co. vs. Piccolo, 107 Pac. 353, the statute in this construction was designed "to make claim jumping HARD."

Let us regard the results of this holding in Cunningham vs. Pirrung as affecting the activities of the much-despised "claim-jumper" in favor of the "dog in the manger" policy, as it was well termed in one of the decisions of this Court.

Abandonment may occur even before forfeiture under the labor requirement of the Federal Act. Such abandonment according to the authorities restores the land at once to the public domain. But as this result is predicated so largely of intent there may be reasons of practical expediency why the subsequent claimant should be required to serve notice on the world of this peculiar basis of his title, the requirements of law having been otherwise complied with. Even in the sparsely settled mining districts it is usually an easy matter to determine with certainty whether the assessment work has been done. Unless the mine is being actively worked, the months of November and December find the claimants on the ground doing the work for that year. The evidence is there on the first of every year. In addition the privilege is accorded to the locator of recording an affidavit setting forth the fact, which affidavit in any legal proceeding becomes prima facia evidence of its own truth such legislation being valid upon the ground that it affects merely evidence and forecloses no actual rights.

Assume, however, that no work has been done on a claim, a claim situated in such portions of our country, as especially require development—in the vast uninhabited wastes of mountain and plain so characteristic a feature of many of the mining states, subject, as they are in much of these regions, to torrential rains and the consequent erosion of flood waters, and the disintegration of a burning sun, torrid days, and in the higher altitudes of the mountains where much of our mineral wealth is to be found, freezing nights—regions which in their primal state at least, tempt the enterprise and industry of man only because of the mineral wealth to be found there. It is true that in one or two seasons shafts and tunnels may be caved or filled; monuments perhaps entirely obliterated; the location notice missing from the can in which it is usually "posted" or undecipherable; the miner or prospector arrives upon the scene and discovers in the truest sense of the word, valuable mineral in place. He knows that somebody thought the prospect was good enough at least to attempt a location, and also that it is probable that the locator afterwards thought it insufficient to warrant further effort at exploitation. Depending upon his own sagacity, how-

ever, he decides to locate the claim. If this happened prior to March 12, 1907, and he knew the law of Cunningham vs Pirrung, his first solicitude would be to hold court without evidence and make a correct decision for upon his judgment as to whether the first locator ever perfected a location, or having perfected it, abandoned or forfeited it, may depend the validity of his location, if the find turns out to be valuable.

A vicious principle cannot be upheld or fortified by the probability that it may not work out in practice according to its nature: and the above is no overdrawn picture. Every liberality is rightfully extended to the original discoverer so long as he complies with the law, in substance; but as a corollary from the same proposition, he who does not so comply should not be treated with misplaced tenderness.

(b) **If the statute be susceptible of the construction placed upon it by the Court in the Cunningham and Score cases it is unconstitutional and in conflict with Sections 1851 and 2324 of the Laws of the Unted States.**

The Arizona Legislature in 1901 for the first time penalized the failure to comply with this section.

(See History of the Act in Cunningham vs. Pirrung.)

Prior to that, the ruling in Rush vs. French, 25 Pac. 816 (Ariz.) (See also Sec. 274 Lindley on Mines) was to the effect that invalidity ensued only when the statute or district regulation specifically so provided.

Act 104 of the Laws of 1909 of Arizona enacted that no relocation of an abandoned mining claim made prior to March 12, 1907 should be held to be invalid upon the ground that the notice of relocation did not state that said claim was in part or whole an abandoned mining claim.

Chapter 22 of the Laws of 1907, adopted March 12,1907, (since in force) enacted as a substitute for 3241 is in that part as follows:

"The location of an abandoned or forfeited claim "shall be in accordance with the provisions of Paragraph "3232, (Sec. 2) of Title 47, Chapter XLVII of the Re-"vised Statutes of Arizona, 1901, except that the relocator "may, if he so elect, perform his location work by sink-"ing the original location shaft ten feet deeper than it was "originally, or in case the original location work consisted "of a tunnel or open cut, he may perform his location work "by extending said tunnel or open cut by removing there-"from 240 cubic feet of rock or vein material"

in other words, a relocation may be made in all respects the

same as an original location, with the exception noted.

What other states and territories have thought competent for them to do may be seen by inspecting their enactments on the subject, which can be found in the 2nd book of Lindley on Mines, 2d Ed. at the following pages: Colorado 1831; Idaho, 1843; Montana, 1856; Nevada, 1865; New Mexico, 1879; North Dakota, 1890; Oregon, 1895; South Dakota, 1903; Washington, 1923; Wyoming, 1932: Utah, California and Arkansas having no legislation on the subject. All of these with the exception of Washington and New Mexico refer in terms to abandoned claims only; New Mexico refers to any relocation but enacts that it shall be as an original location; and none of them in terms imposes any penalty whatever, for a failure to comply with the provisions.

Legislation of this kind may be supported upon the ground that the Federal Statutes make no provision for the relocation of abandoned claims, and that the policy of the mineral laws as exhibited by the Federal Enactments, is furthered by adding a class of claims which might otherwise remain undeveloped for considerable times.

Lindley suggests a doubt on that however. Sec. 642. p. 1198.

The decision in Cunningham vs. Pirrung by making claim jumping hard presents the antithesis of the notion that the Federal Law exacts good faith in development.

Section 2324 of the Revised Statutes of the United States provides in part as follows:

"The miners of each mining district may make regula-
"tions not in conflict with the laws of the United States,
"or with the laws of the State or Territory in which the
"district is situated, governing the location, manner of re-
"cording, amount of work necessary to hold possession of
"a mining claim, subject to the following requirements:
"On each claim located after the tenth day of May,
"eighteen hundred and seventy-two, and until a patent has
"been issued therefor, not less than one hundred dollars'
"worth of work shall be performed or improvements made
"during each year * * * * * and upon a failure to
"comply with these conditions, the claim or mine upon
"which such failure occurred shall be open to relocation in
"the same manner as if no location of the same had ever
"been made."

It is our contention that the spirit and intent of this enactment is to provide that upon the failure of an original locator

to comply with the provisions of the section as to the performance of the work or making of the improvements, that the ground is open to relocation in the same manner as if no location had ever been made, and that no law may be enacted by the legislature of a state or territory imposing any burden upon the exercise of the right to relocate or discriminating against a relocator in the exercise thereof; that while it is true that the section contemplates that the state may adopt regulations governing original locations, the same, or laws not more onerous, are and should be made applicable to the subsequent claimant.

The general limitations upon State or Territorial Legislation under the acts of Congress generally, in reference to the disposal of mines, are treated of by Lindley in the following sections, to which and the authorities cited we respectfully refer the Court:

Secs, 248, 249, 250 and 251.

Sec. 380.

Secs. 642, 643, 644, 645.

We call the attention of the Court further to Sec. 408 of Lindley on Mines for a commentary upon the language of Sec. 2324 in the particular referred to.

When Lindley says in Section 250 that legislation which is unquestionably valid, is such as limits the length of a claim to less than 1500 feet, he refers to the provisions of Sec. 2320 of the Revised Statutes of the United States.

See Lindley Sec. 361 on page 645, where he also quotes Morrison on Mining Rights as holding a contrary view. The question is abstract however because no state or territory has ever attempted to so limit a vein on the length; while the same section of the R. S. recognizes that state legislation may limit width to not less than 25 feet on each side of the vein.

The case of Northmore vs. Simmons, 97 Fed. 386 is criticized by Lindley. (See Sec. 250 (13) p. 441.)

That a custom that twenty days labor shall stand for $100 is invalid, see Penn vs. Oldhauber, 61 Pac. 649.

We cite also generally:

Dufrat vs. James 65 Cal. 555; 42 Pac. 562.

Russel vs. Brousseau 65 Cal. 608.

Carlin vs. Freeman, 75 Pac. 26.

After diligent search for any authority upon the construction of the statute in the particular under discussion, we are able to find only one other case, which is upon the construction of the statute of Washington having to do with relocation

of forfeited or abandoned lode or quartz claims, substantially the same as the Arizona statute.

This is the case of National Mill & Min. Co. vs. Piccolo, 104 Pac. 128; and the opinion upon rehearing of the same is to be found at 107 Pac. 353.

The first opinion was that while the original locator had not done the work required by the Act of Congress sufficient to hold the claim, that the appellant and relocator had not perfected a valid relocation for two reasons: That he had not sunk a shaft on the lode of the claim, the Court construing the statute to make this necessary notwithstanding the claim was west of the Cascades; and that he had not stated in his "location certificate if the whole or any part of the new location is located as abandoned property." No authorities were cited, nor reason given for this latter holding; the Court merely announced such holding. The judgment for the respondent was therefore affirmed.

On the rehearing, in which significantly enough, the respondent did not seem content to rest on this enunciation of the law, but asked the Court to go with him on the fact of sufficient work, the Court reversed the judgment, holding that the law could not be held to require upon a proper construction, discovery shaft West of the Cascades; but as to the other proposition, saying merely "it may be conceded that, under the federal authorities, the location of the appellant was sufficient." In view of the reversal, the word "may" is to be read "must," as the decision was necessarily predicated on such holding. The minority protested that "the object of the law of 1899 was to make claim jumping hard." But the minority did not urge that the decision was wrong on any other point than the law announced as to discovery shafts.

This case is therefore an authority in favor of our contention, though the Court seemed loath to announce the ruling expressly.

Sec. 3232 of the Arizona Code provides the steps to be taken to perfect the location of a claim upon the discovery of mineral in place. When these provisions of the law have been complied with a valid location is perfected. Par. 3234 allows the locator ninety days from the time such location is perfected to record a copy of his location notice, to sink a discovery shaft, and to monument his claim upon the ground so that the boundaries may be readily traced. The power to enact this legislation as to the first two acts is granted in general terms and the marking upon the ground is specifically called for, by Sec.

2324 U. S. R. S., so that this legislation is unquestionably proper, and no rights can be vested without compliance therewith.

Sec. 3235 provides that the failure to do all the things enumerated in this (Amended Laws 1903, page 146 Session Laws of Arizona to strike out "this" and insert "the preceding") section in the time and place specified shall be construed into an abandonment of the claim, and all right and claim thereto of the discoverer shall be forfeited."

Sec. 3241 is open to a possible construction in view of these provisions, that it has reference only to abandoned property as so defined, in which case the "abandoned or forfeited property" of 3241 would be synonymous. In view of the decisons the construction is out of the question; and undoubtedly 3241 refers to all relocations. Referring to all relocations, it must be concluded that the distinction between forfeiture and abandonment is made where it exists in the general law except as modified by the provisions quoted. If we construe abandoned claims to comprehend claims thus abandoned and also claims abandoned within the meaning of the general law, and forfeited claims to refer only to those forfeited for failure to do annual work, we preserve the harmony of the Federal and Territorial Enactments. If this construction which is not unreasonable, cannot be placed upon the section, then we contend that the law is violative of the express terms of Section 2324 U. S. R. S. as argued above.

An examination of the resume of state and territorial legislation given by Lindley in the work cited shows that with the exception of South Dakota and possibly New Mexico, the consequences provided by Sec. 3235 of our Code to follow upon failure to comply with the statutes on location, or requirements after location, are not expressed in the codes of any of the mining states and territories.

The location is in terms pronounced "void," but that such failure shall be construed into an abandonment or the rights of the discoverer forfeited thereby, is not said.

Specifically, the following states have no legislation similar to our Section 3235; Arkansas, California, Colorado, Idaho, Montana, Nevada, Oregon, Utah, Washington and Wyoming.

For South Dakota, See p. 1900 thereof; New Mexico, see reference Subd. 9, 11, page 1883, to Laws 1889, p. 43 Sec. VI; Comp. Laws of 1897, p. 592, Sec. 2303, the exact scope of which we are not able to ascertain not having access to the Statutes of New Mexico here. Arizona stands alone as to the two sections now under discussion; and no argument can be

made even in her case to uphold the decision in Cunningham vs. Pirrung on a *stare decisis* theory for only from the date that opinion was rendered, down to March 12, 1907, we confidently assert was it the general opinion that such could be said to be the law in this territory, as to a forfeited claim.

ASSIGNMENT OF ERROR NO. 1

Certain questions against the sufficiency of the complaint were raised by the appellees in the Supreme Court of the Territory for the first time, not included in the above presentation.

They were that the location notice was void for uncertainty, and that the answer and cross-complaint were insufficient as pleadings. The questions were not specially raised by demurrer, nor argued in the lower Court at all. In the reply brief for appellant filed in the Supreme Court we answered (that being our first opportunity) all the propositions advanced and further under the doctrine that a demurrer searches the record, (Sec. 6 Ency of Pl. and Pr. 326,) and the rule as hinted in Keppler vs. Beckwith, 80 Pac. 334, challenged the sufficiency of appellee's complaint. The Supreme Court in the opinion in this case (See Tr. of Rec. p 16 fol. 30) decided that the complaint was good, and we cite that as a ruling in our favor as to the answer and cross-complaint upon these points.

THE LOCATION NOTICE IS NOT VOID FOR UNCERTAINTY.

The claim is triangular in form. The triangle described in the notice is not only geometrically possible, but it is an actuality; as may be seen from an inspection of the survey attached to the original answer. No extra lateral rights could be claimed under such a location, but that does not render the location void. The fact that no direction is specifically mentioned in connection with the courses bounding the triangle cannot be fatal to the notice. The distances given when aided by the monuments on the ground and the statement of their position as North-East, South-West, South-Easterly, are clear as to what was intended; in the absence of proof to the contrary the monuments referred to, should, it would seem, be deemed to be the monuments required by law; and that being so, a subsequent locator would have no difficulty in ascertaining the ground intended. The location notice is not required to contain a description of such monuments, nor to state even that monuments were erected.

Sec. 3232, Revised Statutes of Arizona.

The ground is in fact specifically described.

"Beginning at a monument at a point Easterly direction 50 feet from the discovery shaft (at which this notice is posted) being in the center of the Southeasterly end of said claim; thence 648 1-2 feet to a monument being the Southwest end of said claim;" and so, with the other courses and distances.

That location notices are to be construed liberally rather than technically; that the sufficiency of the reference to natural objects or permanent monuments, required by the Federal law, is a question for the jury; and that in the absence of evidence for or against the sufficiency of the reference in the notice as to such objects, it will be presumed sufficient; that the burden is on the party attacking to show the insufficiency; that the sole object of the law in requiring a location notice is to guide subsequent locators—are all propositions amply sustained by authority and we call the Court's attention in support thereof to the text and citations in Secs. 381 and 383 of Lindley on Mines (2nd. Ed.) Vol. 1 and the cases cited by that author.

In particular see:

Talmadge vs. St. John (Cal.) 62 Pac. 79.
Wiltsee vs. King of Arizona, 60 Pac. 896.
Kinney vs. Fleming, 56 Pac. 723.
Farmington Gold Mining Co. vs. Rhymney 58 Pac. 833.
Carter vs. Bacigalupi, 23 Pac. 362.
Morrison vs. Regan, 67 Pac. 956.
Fissure Mining Co. vs. Old Susan, 63 Pac. 587.
Bramlett vs. Flick, 57 Pac. 869.
Wilson vs. Triumph, 56 Pac. 300.

Appellee says that we claim no width; therefore should have none. It would be a difficult if not an impossible matter, where, as in this case, the shape of the ground is triangular to comply with the law in that regard; if this requirement is to be taken literally, it would require the locator to embody in his notice a long numerical series. If a substantial compliance is all that is asked, such is given in the location notice which bounds the claim, and states as is required by law, the *general course,* of the lode.

In Hammer vs. Garfield Mining Company 130 U. S. 299; 32 Law Ed. 967, the Court, in discussing the Federal Statute, makes use of the following language:

"These provisions, as appears on their face, are designed to secure a definite description—one so plain that the claim can be readily ascertained. A reference to some natural object or

permanent monument is named for that purpose. Of course the section means, when such a reference can be made."

Is it reasonable to suppose that our statute requiring the width to be stated is of greater obligation than the requirements of the Federal law?

As stated above, our statutes do not require that the location should state that the ground was monumented. The purpose, according to all decisions which have treated of that phase of the subject, of requiring any description to be stated, is that a subsequent locator should know what were the limits of the claim. If then, the location notice does state actual monuments, does it not go as far as the law requires?

Shattuck vs. Costello, 68 Pac. 531 cited below by appellee, merely holds that a reference to mining claims in the location notice sufficiently complies with the Federal law. No emphasis was placed on the idea that they must be specifically named, nor was any general principle stated as to what would constitute a sufficient reference. Appellee in substance says that because the court held such a reference sufficient any other would be insufficient.

Providence Gold Min. Co. vs. Burke, 57 Pac. 645 cited by appellee favors our contention.

AS TO THE ANSWER AND CROSS-COMPLAINT.

Appellee cites Power vs. Sla, 61 Pac. 468, which holds that the relocator should negative both labor and improvements in his pleadings. In that case the pleading of the defendant negatived the doing of $100 in work and labor, and the Court held that the making of improvements should also have been negatived. The pleadings of the defendant herein allege that the annual *assessment work* required by law was not done or performed. The requirements of law or that which is required to hold a mining claim, under the law, refer to either labor or improvements. It is not necessary, we believe, to inquire closely into the etymology of the words "assessment" and "work" further than to say that the latter is generic, and includes labor as a class of work; that the word assessment is not used in the statute stating the obligation, but we do say that "assessment work" as a substantive has in American mining law, and in the common parlance of miners, a well defined signification, connoting both the labor and improvements mentioned in the statute.

Lindley in Sec. 623 of his work on Mines, (2nd. Ed.) Vol. 2, has this to say:

"As noted in previous section, discovery was made the source of title, and development, or working, the condition of its preservation. This development was called by the miners "assessment work" and the performance of it a *representation* of the mine; that is, when the work had been performed for a given period, the claim was *represented* for that period. Both of these terms are frequently encountered in the decisions of the courts, and they each have a recognized meaning."

All throughout this chapter the learned author uses the word "work" and the words "assessment work" in the same sense. (See Chap. V, Sec. 623, *et seq., passim.*)

In the very section (2324) of the statutes requiring labor or improvements, the following clause is to be found "provided that the original locators, their heirs, assigns, or legal representatives, have not *resumed work* upon the claim after failure and before such location." Would not the placing of improvements be a resumption of work?

The Federal Act of July 2, 1898, Ch. 563, 30 Stat, at Large, 651, (See Vol. 5 Fed. Statutes Ann. page 21.) uses the following language for the heading of Section I of that act "volunteers in war with Spain relieved from assessment work' and in the body of the Section, as a synonym for labor or improvements "no mining claim shall be subject to forfeiture for non-performance of the annual assessments." Sec. 3 of the same act, "fail to do such proportion of one hundred dollars' worth of work" * * * "that relocators had done the annual work", "which work may be done." Would not improvements under Sec. 2324 be "work" within the meaning of the Act?

We submit there is nothing in this contention of Appellee.

Appellee also takes exception to the pleadings of the defendant of the further ground that "entered and duly located said land as a mining claim" is a conclusion of law.

The answer states that "while said land was open to relocation as aforesaid," "the denfendant Daley entered upon said land and duly located said land as a mining claim and performed all acts required to perfect said location prior to any attempt of plaintiffs herein to resume work thereon."

Admitting these allegations to be conclusions of law, they do by reasonable intendment show that, first, the ground became open to relocation by failure to do the annual assessment work, and second, while so open, that the same was relocated and all acts required by law to perfect the location done before work had been resumed thereon.

In Phillips vs. Smith, 95 Pac. 92 it is held that the averments of conclusons of law in place of fact, make the resulting insufficiency and imperfection a matter of form rather than of substance and the proper remedy is by motion. Further than this, however, the cross-complaint sets up title and ownership in defendants. This involves a denial, and more. Under all canons of pleading this is certainly sufficient.

We believe the pleadings to be sufficient under the authority cited.

For the above reasons, and because there is no pleading to our answer and cross-complaint except the demurrers, we contend that the judgment of the Supreme Court of the Territory of Arizona should be reversed as a finality.

Respectfully Submitted,

EDW. M. CLEARY,

Attorney for Appellant.

EDW. J. FLANIGAN,

OF COUNSEL.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1911

NO. 178

CHARLES CLASON, APPELLANT,

VS.

NICK MATKO, DAN SEFER, JONH LOPIZICH, J. KRILANOVICH, AND LOUIS VISALIA, APPELLEES

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA

Brief of Appellees

Appellant's brief begins with the misstatement: "The action was brought . . against Charles Clason" . . . . This statement is shown to be untrue by appellant's fourth amended answer, Tr. of Rec., p. 3, beginning ninth line from foot, and by Matko vs. Daley, 10 Ariz., 175.

The action was commenced against August Daley, 1903, by appellees, was thus twice tried in the District Court and once in the Supreme Court where Daley lost and then abandoned the whole controversy, March 3, 1906.

The second sentence of the first paragraph beginning on p. 2 of appellant's brief, says: "Proper proceedings to effect a severance (from Daley) were had and taken by appellant before

perfecting the appeal." . . . The "appeal" is apparently the one at bar, and the "proceedings" the "advertising out", pp. 23–24, Tr. of Rec., which appears (Tr. Rec., p. 23, first paragraph from top,) to have been filed in the Supreme Court of Arizona on April 26th, 1909, after judgment of affirmance had been rendered and announced.

The first paragraph of his brief, p. 3, begins: "Inasmuch as the location notice of August Daley to whose rights this appellant succeeded." . . . . Here is where and why we contend that appellant fails to show that he "succeeded" to Daley's right to the mine in controversy, or that appellant has any right to it. The fourth amended answer, on which the case was submitted, Tr. of Rec., p. 6, Exhibit A, shows August Daley to have been the sole relocator, and id., p. 7, Ex. B. (amended lacation notice) to which appellant's name first appears with Daley's, is identical in every material particular with the original relocation notice of Daley, describing precisely the same ground, and in addition only stating the legal effect of the original. This fourth amended answer alleges no transfer of the mine by Daley to appellant, and said "amended relocation notice" and said "advertising out" constitute the whole means whereby appellant claims title.

Said "amended notice" being a mere repetition of its original and made more than three years later, is necessarily exactly the same in legal effect as if appellant had appended his name at that time to the original notice posted by Daley. Title had vested in Daley, and appellant could get it only by a transfer by Daley, which is not shown.

It therefore follows that appellant was not a "co-owner" under Sec. 2324, Rev. Stat. of U. S., and hence could not "ad-

BRIEF OF APPELLEES

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vertise out" Daley, and for all these reasons the "advertising out," by which alone he claims, is absolutely void and appellant is thus shown to be now a party without interest or standing herein.

Turner vs. Sawyer, 150 U. S., 578.

This class of forfeitures has always been held by the courts to be odious, and requires strict proof in every particular.

Hammer vs. Garfield M. and M. Co., 130 U. S., 291.

Prov. G. M. Co. vs. Burke, 6 Ariz., 323, 57 Pac. 541.

Another fatal objection to appellant's standing herein is that his "advertising out" proceeding has never been adjudicated, his "notice of forfeiture" (Tr. Rec., p. 23) having been first brought into this case by filing it in the Supreme Court of Arizona after it had affirmed the judgment of the Pima County District Court. Appellant is thus attempting to have his title to the Bangor claim adjudicated for the first time on this appeal. This Court has no original jurisdiction in such cases, certainly not on appeal. It seems clear that appellant has been a mere volunteer and interloper in this matter from the time he appended his name to said "amended notice." This is conclusively shown by the fact that Daley wholly abandoned the defense of the case after he lost it in the Supreme Court of Arizona, March 3, 1906. Matko vs. Daley, 10 Ariz., 175, 85 Pac. 721, and appellant's "advertising out" proves such abandonment by showing that Daley failed to do any assessment for 1906, and on the 30th day of July following, appellant surreptiously made and put his name and Daley's name to the "amended location notice." Ex. B, Tr. Rec., p. 7.

But even if it should be held that by said "amended location" appellant became a "co-owner" with Daley and that by said

"advertising out" he became sole owner, as against Daley, still it cannot be held that he thus or otherwise acquired any right in or to be in this case. Paragraph 1343, Rev. Stat. of Arizona of 1901, is our only law on the subject of new parties coming into a case, and it requires an order of the court (nisi prius) in every such change. This disposes too of appellant's claim to avail himself of the "stipulation" made prior to August 20, 1904, between August Daley alone of the one part and appellees of the other part. Tr. Rec., pp. 3 and 4, (appellant's own showing.) Appellant has never been a party to that stipulation, and none but a party may avail himself of it.

54 Cal., 386, (given under a statute the same as Par. 1391, Rev. Stat. Ariz. of 1901.)

12 Ala., 369; 30 Pac. 529.

In said fourth amended answer, foot p. 3 and top p. 4, Tr. Rec., appellant alleges: "That the said defendants Daley and Clason . . . have during the years 1904, 1905, 1906 and 1907 done and performed at least one hundred dollars' worth of work on said claim during each of said years." (Verified by himself.) He cannot, therefore, "advertise out" Daley for failure to do labor for 1906. He is estopped from holding inconsistent positions in court, especially when urging a double forfeiture in an equity suit. Bigelow on Estoppel, Ch. 26.

We therefore respectfully submit that this appeal should be dismissed or the judgment affirmed with costs.

We now proceed to answer the merits.

The only question on the merits presented by this appeal is one of pleading. Does the fourth amended answer state sufficient facts? This action attempts to set up a forfeiture of the Bangor mine by appellees and a relocation thereof by

said August Daley, setting out his relocation notice, "Exhibit A," Tr. Rec., pp. 6-7, and making it part of the answer, Tr. Rec., p. 3. Paragraph 3241, R. S. of Arizona, of 1901, then in force, made every such relocation notice void that failed to state whether any of the ground was relocated as abandoned or forfeited land. This notice wholly fails in this particular and is otherwise self-contradictory and insensible. Appellees interposed a general demurrer to the answer, which the courts sustained. Tr. Rec., pp. 16, 17, 18, and 12 Ariz. Rep., 213.

The Supreme Court of Arizona has frequently sustained this provision of our statute and held that the words "abandoned" and "forfeited" are used interchangeably therein.

Cunningham vs. Pirrung, 9 Ariz., 288, 80 Pac., 329.

Score vs. Griffin, 9 Ariz., 295, 80 Pac., 331.

Matko vs. Daley, 10 Ariz., 175, 85 Pac., 721.

Clason vs. Matko, 12 Ariz., 213, 100 Pac., 773.

Said provision at the end of Paragraph 3241, R. S. Ariz., 1901, is but an enactment of a common miners' rule that has always been held valid.

Rush vs. French, 1 Ariz., 99;

Johnson vs. McLaughlin, 1 Ariz., 493;

Emerson vs. McWhirter, 133 Cal., 510;

Jupiter M. Co. vs. Bodie Cons. M. Co., 7 Saw., 96.

Flaherty vs. Gwinn, 1 Dak., 509.

Besides our points already made showing that the "stipulation" is not available to appellant, it is evident from the paper itself and the conduct of the parties (as observed by sup. ct. of Ariz., Tr. Rec., p. 17) that the "stipulation" was never intended as a pleading or as fixing the legal effect of the relocation notice,

but stmply as evidence of the few facts specified, both sides having frequently amended after the stipulation, defendants have never made the "stipulation" part of the answer, but have expressly made said relocation notice part of every answer. It is not even set up now as an estoppel. It was not adduced as evidence at the trial, so is not now before the Court. Besides, the contention that it fixes the legal effect of the relocation notice and answer is untenable since no matter of law may be so fixed in Arizoda. Graves vs. Alsap, 1 Ariz., 274. Where the Court says: "We hold that parties to an action cannot properly stipulate what the law is that is to govern their case, and that courts should not regard such stipulation when made, and we are equally of opinion that they cannot stipulate what the action of a law-making body was in a given case, and from the stipulations thus made ask the Court to determine whether a general law is or is not in force." Id., 1st Par. p. 282. We thus quote the full holding on the point because appellant (Br. p. 8) actually says it was simply held that the law in the particular case at bar could not be stipulated, but the quotation holds the broad proposition we contend for. See also City of Tombstone vs. Reilly, 4 Ariz., 102;

Helms vs. Johnson, 12 Heisk, 158; (directly in point)

20 Ency Pl'd & Pr., pp. 613, 614.

All of appellant's brief, pp. 5-9, persistently ignores the vital fact that the "stipulations" there discussed were always invoked by actual parties to such stipulations. also the Arizona doctrine that law can not be stipulated.

Appellant's brief, pp. 9 to 18, inclusive, is noticeable only for the irrelevancy of its arguments and citations and an attempt at hair-splitting surpassing the acumen of Hudibras, who "could

distinguish and divide a hair 'twixt south and southwest side."

Under "Assignment of Error No. 1," Brief p. 19, appellant is unusually incorrect and confusing, saying that appellees had raised "questions against the sufficiency of the complaint" in the Supreme Court of Arizona; "that the location notice (?) was void for uncertainty, and that the answer and cross-complaint were insufficient as pleadings."

The record shows that appellees have never attacked their complaint, and equally shows that by demurrer they attacked the sufficiency of the re-location notice, and consequently the sufficiency of the whole answer.

Besides the fatal failure of the relocation notice to comply with the last requirement of Paragraph 3241, R. S. of Arizona, of 1901, said notice is otherwise void. An instant's comparison of this re-location notice, "Exhibit A and B," Tr. Rec. 6, 7, with appellees' location notice, id. 2 and 3, demonstrates that the relocation notice, does not describe all the ground decribed by said location notice, if it describes any part of it. Appellees' notice describes on the ground a tract 800 feet long, 600 feet wide at its west end, and 100 feet wide at its east end. The re-location notice does not include this, or anything else. Appellant's brief now says his claim is a "triangle," but his answer is silent as to that. The "triangle theory seems an afterthought, but even this does not meet our point. The answer, Tr. Rec., p. 3, says in terms that the claim described in the complaint was re-located by said Daley, but his notice shows that he attempted to re-locate only part of it. The answer attempts to show no more than that "assessment work" was not done on the part of appellees' claim described by the re-location notice. The validity of the original location being thus ad-

mitted, it was necessary for Daley and appellant to plead a failure of work on all the claim.

Paragraph 3232, R. S. of Arizona, in force since 1901, says: "The location notice must contain . . . 4. The length and width of the claim in feet, and the distance in feet from the point of discovery to each end of the claim." Id., Par. 3233. "Until each and all of the above specified things shall be done, no right thereto shall have been acquired." Id., Par. 3241, extends all this to re-location notices.

This "relocator" claims no width, hence he is entitled to none even as against the United States, and his location is void. Id., Par. 3232, sub. 4. This notice thus failing to contain what the statute requires, and a copy of which notice is to be recorded, is universally held to be void.

Sub. 1, Par. 3234, R. S. Ariz., 1901;

Deney vs. Co., 67 Pac.. 724;

Purdum vs. Laddin, 59 Pac., 153.

The last clause of sub. 4, Par. 3232, R. S. Ariz., of 1901, says the notice must state "the distance in feet from the point of discovery to each end of the claim." This amended "relocation notice" says this is: "50 feet in a southeasterly direction, and 420 feet in a westerly direction from the center of the discovery shaft." Tr. Rec., 7, thus making the total length 470 feet, and states the following metes and bounds: "Beginning at a monument at a point easterly direction 50 feet from the discovery shaft, being in the center of the southeasterly end of said claim; thence 648½ feet to a monument, being the southwest end of said claim; thence 584½ feet to a monument, being at the northeast corner of said claim; thence 470 feet to a monument at the place of beginning." This first distance of

648½ feet extends 178½ feet beyond the greatest length of the claim, and purports to end at "a monument, being the southwest end of said claim." Absurd and impossible, and no direction is given for this or any other bound. The "description" is void.

This fourth amended answer fails to state sufficient facts to constitute a forfeiture.

Sec. 2324, R. S. of U. S., of 1878; Act of Feb. 11, 1875, ch. 41, 18 Stat. L. 315, and Par. 3239, R. S. of Arizona, of 1901, require $100 worth of labor to "be performed or improvements made, or a tunnel run" on or for such claim each year. Therefore, to plead a forfeiture, a relocator must negative performance of $100 worth of labor, the making of $100 worth of improvements and the running of a tunnel costing $100. Power vs. Sla, 61 Pac. 468, (in point.)

The only attempt in this answer to plead forfeiture is made by the following vague statements of mere legal conclusions: "That the annual assessment work required on said claim for the year 1902, nor for the year 1901, were neither of them done and performed." Tr. Rec. 3, "that the annual assessment work required by law was not done and performed for the year 1902, nor for the year 1901." Tr. Rec., p. 6. Not a word about the value or even the amount of "work." The federal statute calls for $100 worth of either labor, improvemvnts or tunneling. Appellant meets all this by simply saying that these three different terms designate exactly the same thing, and that his phrase, "annual assessment work," means the same. If appellant is right on this point, then it would have been sufficient pleading for him to say: "The annual improvements required by law were not made," or, "The annual tunnel required by

law was not run." We believe with the court in Power vs. Sla, supra, that at least both the labor and the improvements must be negatived in order to show forfeiture. Congress was not guilty of the confusing tautology thus charged by appellant.

By counting on a forfeiture appellant conclusively admits the validity of appellees' location.

Belk vs. Meagher, 104 U. S. 279;

Proeidence G. M. Co. vs. Burke, 6 Ariz. 323.

Therefore, we respectfully submit that this appeal ought to be dismissed or the judgment affirmed.

SERVEN & JOYCE,
Attorneys for Appellees.
JOHN McGOWAN,
of Counsel.

A. R. Serven

CLASON *v.* MATKO.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

No. 178. Submitted February 26, 1912.—Decided March 11, 1912.

Where the statute provides for an agreed statement on which the case can be submitted, a stipulation between the parties as to certain facts will not be considered as an agreed statement superseding the pleadings but only as an agreement relating to the facts enumerated in the stipulation.

This court is not disposed to reverse a lower court on its construction of a stipulation in the conduct of a case, even if the stipulation be ambiguous.

While there may be a distinction between abandonment and forfeiture of mining claims, there is no distinction as those terms are used in § 3241, Rev. Stat., of the Territory of Arizona.

That which is taken subject to a right cannot be a burden upon that right.

Section 3241, Rev. Stat., Arizona, was enacted pursuant to the power given by § 2324, Rev. Stat. of the United States, and is not in conflict either with that section or with § 1857, Rev. Stat. of the United States.

10 Arizona, 175, affirmed.

THE facts, which involve the construction and constitutionality of the mining laws of Arizona and the validity of a mining location thereunder, are stated in the opinion.

Mr. Edw. M. Cleary and *Mr. Edw. J. Flanigan* for appellant.

Mr. A. R. Serven and *Mr. John McGowan* for appellees.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Action to quiet title to a mining claim called the "Bangor." The action was brought in the District Court of the First Judicial District, County of Pima, Arizona, by appellees as plaintiffs against August Daley, Clason, appellant here, subsequently being made a party. It will be convenient to refer to appellees as plaintiffs and, except where necessary to expressly distinguish appellant, to include him with Daley under the designation of defendants.

The amended complaint alleged the location of the claim by one Scott Turner and the recording of the notice thereof, a copy of which was annexed to the complaint. There was an allegation of a claim of interest in the defendants, and a prayer for judgment "establishing plaintiffs' estate in and exclusive possession" of the claim and "debarring and forever estopping defendants, and each of them, from claiming any right or title" thereto.

The fourth amended answer of the defendants denied the allegations of the complaint, except that Scott Turner filed a notice of location, and alleged that the claim of the plaintiffs had become forfeited on account of their failure to do the necessary assessment work and that August Daley entered upon and relocated the claim.

As a further defense it was alleged that the action had been originally commenced against Daley as the sole defendant, and that in the first trial of the action a stipulation was entered into as follows:

"That all parties plaintiff and defendant are now and at all the times mentioned in the pleadings have been each citizens of the United States of America.

"That the respective locations, upon which, as shown by the pleadings herein, the parties plaintiff and defendant, base their rights to the 'Bangor' Mining Claim, were

each duly made, and that all acts required by the laws of the United States, and the laws of the Territory of Arizona, necessary to vest in the parties so locating good and valid titles so far as valid location could vest the same, such as mineral discovery, monumenting of claim, and recording of location notices, etc., were each duly done and performed at the time of said locations, except that plaintiffs do not admit that at the time of said location of defendant Daley the ground was open to such location by reason of failure to do assessment work for the years 1901 and 1902, or to resume work prior to the date of said location."

The case went to trial, it is alleged, on the single issue whether the claim was open to location, and resulted in a judgment against Daley. A new trial was granted, which took place, and the agreement was recognized by counsel and the parties to be still in force and effect, and the same issue was submitted to a jury as in the first trial to the court, and a verdict and judgment went for defendant Daley. The judgment was reversed by the Supreme Court and the cause remanded for a new trial (10 Arizona, 175, 85 Pac. Rep. 721), the court saying (10 Arizona, 179): " . . . Under the allegations in the defendant's cross-complaint with respect to the relocation by the defendant of the claim as a forfeited claim, the location notice of the defendant would seem to be void, in failing to state that the claim was located as forfeited or abandoned property, as required by the statute, and would seem to afford the defendant no ground for the relief claimed. *Cunningham* v. *Pirrung*, 9 Arizona, 288, 80 Pac. 329."

The defendants ever since the making and filing of the agreement have relied on it as establishing the doing of assessment work on the claims and the validity of the claims by reason thereof, the agreement never having been rescinded or withdrawn.

As a further defense it was urged that the decision of the Supreme Court of the Territory in *Cunningham* v.

Pirrung, in so far as it holds or construes paragraph 3241 of the Revised Statutes of Arizona (Revision of 1901), as it existed prior to the amendment of 1907, to provide that the relocation of a forfeited mining claim shall be void or voidable when the relocation notice does not state that the "whole or any part of the ground covered by such relocation is relocated or located as forfeited ground," and that said statute, in so far as it justifies such interpretation, is contrary to the provisions of § 2324 of the Revised Statutes of the United States in its general terms and specifically to that portion thereof which provides that upon failure to do assessment work therein required such claim "shall be open to relocation in the same manner as if no location of the same had ever been made," and also contravenes the provisions of § 1851 of the Revised Statutes of the United States, and the defendants specially rely upon said provisions of the laws of the United States.

The defendants also filed a cross-complaint, which asserted title in them derived from a location of the claim, a notice of which was attached.

The cross-complaint further alleged that the title of the plaintiffs was derived from Scott Turner, but that plaintiffs had no title by reason of the fact that the annual assessment work had not been performed, that the ground was open to relocation, that before work was resumed Daley entered upon the land and duly located it as a mining claim and performed all acts required to perfect the location prior to any attempt of the plaintiffs to resume work thereon. All of the separate defenses pleaded were made part of the cross-complaint.

The location notice attached to the cross-complaint did not state that the claim was located as forfeited or abandoned property.

There was attached to the cross-complaint an amended location notice signed by August Daley and Charles Clason. It refers to the location by Daley and states

that such location was made as a relocation of forfeited ground for the failure to do assessment work. It further states that the amended notice of location was made, without waiving any previous rights, to secure all of the benefits of paragraph 3238 of the Revised Statutes of Arizona (1901), and without waiving, but especially relying upon, the rights conferred upon Daley by his original location by the laws of the United States. It also states that Charles Clason was the owner of an undivided one-half interest under Daley.

A demurrer was sustained to the cross-complaint, and, defendants declining to amend, judgment was entered for plaintiffs in accordance with the prayer of their complaint upon the stipulation of facts which has been set out above. The case was taken by Clason to the Supreme Court of the Territory, where the judgment was affirmed.

The first question in the case is the effect of the stipulation. Appellant contends that all questions were "formally and expressly" admitted by it "pertaining to the validity of the respective locations except the single question, which was: Was the ground open to relocation on May 1, 1903, for plaintiffs' [appellees'] default in performing the work required by law? It covered, therefore, it is further contended, all acts necessary to be done under the laws of Arizona; that is, to come to the specific controversy in the case, the stipulation contained an admission that the location notice complied with the laws of Arizona, which necessarily includes compliance, it is contended, "with section 3241 in any construction thereof."

The enumeration, it is urged, in the stipulation of certain acts cannot be considered "to have been intended to be exhaustive, but merely illustrative of what the parties considered necessary to make a valid location or relocation," and there was left open only the failure of plaintiffs to do the assessment work. And this, it is insisted further, was the construction of the parties through two trials,

and that its insufficiency is now urged in the face of that fact and that defendants have expended money upon the faith of the waiver of the defect in the location notice.

The trial court and the Supreme Court took a different view of the stipulation and considered it as but a substitute for evidence, not waiving or supplying the defects of the pleadings, and that, therefore, as the cross-complaint contained no allegation of compliance with law, it was insufficient. And both courts held further that the stipulation, as evidence, did not establish such compliance.

The Supreme Court explicitly, and the trial court impliedly, from its action in sustaining the demurrer to the cross-complaint, took a different view of the stipulation as indicated by the conduct of the parties. The "obvious purpose of the parties in filing the stipulation," the Supreme Court said, "was manifestly to have it take the place of testimony or other evidence upon the trial, and not to supplant the pleadings in the case." The court recognized that the parties could under the laws of the Territory have agreed upon a statement of the case which would have a substitute for formal pleadings, but, said the court, "such was not the attempt in this case, as appears from the stipulation itself and the conduct of the parties in the proceedings subsequent to the entry of the stipulation," both parties amending their pleadings after the filing of the stipulation. The court concluded, therefore, that it was not an agreed case under paragraph 1390 of the Revised Statutes of the Territory, "but a stipulation appertaining merely to the matter of evidence upon the trial."

The record seems to support this view. It is true that it appears from the answer of the defendants that the stipulation was filed before the trial of the action and that the case was submitted and decided against defendants on the single issue as to whether the claim was open to relocation by Daley.

A new trial was granted, upon what ground does not appear. It does appear, however, that the case was again submitted on the same issue, a judgment resulting for Daley. It was reversed by the Supreme Court, the court intimating that the defect in the cross-complaint in not stating that the relocation by Daley was upon forfeited or abandoned property, as required by the statute, would seem to make the relocation void, and the intimation was made to control or have effect in the new trial which was ordered. It was after this decision that the fourth amended answer and cross-complaint were filed and the demurrer which attacked the cross-complaint.

But if it be granted that the stipulation is ambiguous, we should not be disposed to reverse the lower court on its construction. It pertained simply to the conduct of the trial and a dispute between counsel as to the effect of an agreement between them, and its decision deprived the defendants in the action of no right which they possessed. We do not consider it necessary to review the cases cited by appellant in which stipulations have been sustained and the power of the parties recognized to waive legal or even constitutional rights.

The construction of the Supreme Court of § 3241 of the Revised Statutes of the Territory is attacked. That section required, before its amendment in 1907, that in case of a relocation of a claim the location notice should state if the whole or any part of the new location was located as abandoned property, else it should be void. The section is inserted in the margin.[1]

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[1] 3241. (SEC. 11.) Such affidavit, when so recorded, shall be *prima facie* evidence of the performance of such labor or the making of such improvements, and said original affidavit, after it has been recorded, or a certified copy of record of same, or the record of same shall be received as evidence accordingly by the courts of this territory. The relocation of forfeited or abandoned lode claims shall only be made by sinking a new discovery shaft and fixing the boundary in the same manner and to

The contention is that this section, properly considered, applied only to "abandoned property" and did not apply to forfeited property, and it is insisted that the distinction between forfeited and abandoned property is well recognized and is "obliterated," by the court's construction.

Of course, there may be a distinction between the abandonment of a claim and its forfeiture, but the question does not turn upon that distinction only, but upon what the statute means, considering all of its words; and, considering them all, we think they show quite clearly that no distinction was intended. Section 3241 provides for "the relocation of forfeited or abandoned lode claims" —in other words, claims which have once been located— and "the new locator's right is based upon the loss of the possessory right acquired by the former locator," to quote from *Cunningham* v. *Pirrung*, 9 Arizona, 288 (80 Pac. Rep. 329), where the rule is announced. The same rule is repeated in subsequent cases, including that at bar. *Score* v. *Griffin*, 9 Arizona, 295; *Kinney* v. *Lundy*, 11 Arizona, 75; 89 Pac. Rep. 496.

Even if we should concede that the statute is ambiguous, we should certainly lean to agreement with the Supreme Court of the Territory. *Fox* v. *Haarstick*, 156 U. S. 674; *Armijo* v. *Armijo*, 181 U. S. 558; *English* v. *Arizona*, 214 U. S. 359; *Santa Fe County* v. *Coler*, 215 U. S. 296, 305; *Albright* v. *Sandoval*, 216 U. S. 331.

The next contention of appellant is that if the statute admits of the construction put upon it by the Supreme

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the same extent as is required in making an original location; or the relocator may sink the original discovery shaft ten feet deeper than it was at the date of the commencement of such location, and shall erect new or make the old monuments the same as originally required. In either case a new location monument shall be erected, and the location notice shall state if the whole or any part of the new location is located as abandoned property, else it shall be void. (Rev. Stat. Ariz., 1901, Tit. 47, p. 839.)

Court of the Territory it is unconstitutional and in conflict with §§ 1857 and 2324 of the Revised Statutes of the United States.

Upon what ground the statute is unconstitutional is not stated, and we can put that objection aside and pass to the asserted conflict with the Revised Statutes of the United States. It is only necessary to consider § 2324. Section 1857 expresses a general limitation of the powers of the Territory by the Constitution and laws of the United States. The other section directly concerns locations of mining ground.

The section permits the miners to make regulations in regard to mining locations not in conflict with the laws of the United States or of the State or Territory in which the mining district is situated, "governing the location, . . . subject to the following requirements: On each claim located after the tenth day of May, eighteen hundred and seventy-two, and until a patent has been issued therefor, not less than one hundred dollars' worth of work shall be performed or improvements made during each year, . . . and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made."

Appellant contends "that the spirit and intention of this enactment" is that upon the failure of the original locator to comply with the provisions of the law "the ground is open to relocation in the same manner as if no location had ever been made," and that, therefore, neither a State nor a Territory can impose conditions or burdens upon the exercise of the right.

That cannot be said to be a burden upon a right to which the right when taken is subject. The section gives to the miners of a mining district and the State or Territory in which the district is situated the power to make regulations "governing the location" of a mining claim,

subject to certain requirements. Those requirements may not be dispensed with, but they may be supplemented, certainly to the extent (and we need go no farther in this case) prescribed by the Arizona statute. It is a provision strictly "governing the location," and is not repugnant either to the spirit or the letter of the mining laws of the United States. *Butte City Water Co.* v. *Baker*, 196 U. S. 119.

Judgment affirmed.